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No. 99-1379-CFX Title: Circuit City Stores, Inc., Petitioner
v.
Saint Clair Adams

Docketed: February 17, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 16 2000	Petition for writ of certiorari filed. (Response due April 17, 2000)
	Mar 13 2000	Order extending time to file response to petition until April 17, 2000.
	Mar 14 2000	Brief amicus curiae of National Academy of Arbitrators filed.
	Apr 17 2000	Brief of respondent Saint Clair Adams in opposition filed.
	May 2 2000	DISTRIBUTED for Conference of May 18, 2000
	May 22 2000	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT November 6, 2000. **********
	Jun 20 2000	Order extending time to file petitioner's brief on the merits to and including August 7, 2000, and respondent's brief on the merits to and including September 19, 2000.
	Aug 4 2000	Brief amicus curiae of Securities Industry Association filed.
	Aug 4 2000	Brief amicus curiae of Society for Human Resource Management filed.
	Aug 7 2000	Joint appendix filed.
	Aug 7 2000	Brief of petitioner Circuit City Stores, Inc. filed.
	Aug 7 2000	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Aug 7 2000	Brief amicus curiae of Credit Suisse First Boston filed.
	Aug 7 2000	Brief amicus curiae of American Arbitration Association filed.
	Aug 7 2000	Brief amici curiae of Equal Employment Advisory Council and LPA, Inc. filed.
	Aug 7 2000	Brief amicus curiae of Texas Employment Law Council filed.
	Aug 7 2000	Brief amicus curiae of Employers Group filed.
	Aug 7 2000	Brief amicus curiae of Council for Employment Law Equity filed.
	Aug 31 2000	Record filed.
	Sep 6 2000	Record filed.
	Sep 11 2000	LODGING consisting of eleven copies of a letter with attachment submitted by counsel for amicus Employers Group.
	Sep 15 2000	CIRCULATED.
	Sep 18 2000	Brief amicus curiae of National Academy of Arbitrators filed.
	Sep 19 2000	Brief amicus curiae of AARP filed.
	Sep 19 2000	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Sep 19 2000	Brief amicus curiae of United States filed.
	Sep 19 2000	Brief of respondent Saint Clair Adams filed.
	Sep 19 2000	Brief amici curiae of California, et al. filed.

No. 99-1379-CFX

Entry	Date	Proceedings and Orders
	Sep 19 2000	Brief amici curiae of Lawyers Committee for Civil Rights Under Law, et al. filed.
	Sep 19 2000	Brief amici curiae of Law Professors filed.
	Sep 19 2000	Brief amicus curiae of Division of Labor Standards Enforcement of California filed.
	Sep 19 2000	Brief amicus curiae of National Employment Lawyers Association filed.
	Sep 19 2000	Brief amicus curiae of National Workrights Institute filed.
	Sep 25 2000	Motion of the Solicitor General to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 13 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Oct 16 2000	Motion of the Solicitor General to participate in oral argument as amicus curiae and for divided argument DENIED.
	Oct 18 2000	X Supplemental joint appendix filed.
	Oct 23 2000	Reply brief of petitioner Circuit City Stores, Inc. filed.
	Nov 6 2000	ARGUED.

Supreme Court, U.S.
FILED

99 1879 FEB 16 2000
No. ——

IN THE
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
SAINT CLAIR ADAMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the Ninth Circuit erred in holding, directly contrary to the holding of every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

2. Whether the Ninth Circuit erred in holding, contrary to this Court's opinion in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 25 n.2 (1991), and the liberal federal policy favoring arbitration agreements, that any agreement to arbitrate between an employer and an employee constitutes an "employment contract" excluded from coverage under the Federal Arbitration Act?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 18, 1999.[1] In the alternative, Circuit City requests summary reversal of the Ninth Circuit's decision in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is here sought to be reviewed, is reported at *Circuit City Stores, Inc. v. Adams*,

[1] A separate Petition for a Writ of Certiorari is being filed concurrently herewith in a related case, *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), which was decided by the same Ninth Circuit panel on the same date, and presents the same questions for review.

194 F.3d 1070 (9th Cir. 1999) (per curiam), reprinted in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> *Section One* "[C]ommerce," as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> * * * *
>
> *Section Three* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

> *Section Four* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. §§ 1, 3, 4 (1994).

STATEMENT OF THE CASE

In March 1995, Circuit City implemented an "Associate Issue Resolution Program" ("AIRP"). Following implementation of the AIRP, prospective applicants are required, as part of the job application process, to execute a document entitled "Circuit City Dispute Resolution Agreement" ("DRA") by which they agree to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator." (ER 63.) (emphasis in original).[2] Prospective applicants for employment with Circuit City must agree to the terms of the DRA in order to have an application for employment considered. (ER 60.) A prospective appli-

[2] "ER" and "SER" cites refer to the Excerpts of Record and Supplemental Excerpts of Record on file with the Ninth Circuit Court of Appeals.

cant may withdraw his or her agreement to arbitrate within three days of execution by withdrawing his or her application for employment. (ER 64.)

The arbitration agreement is a separate, stand-alone agreement between the prospective applicant and Circuit City, entered into as part of the application process. The obligation to arbitrate exists independent of the employment relationship, and applies before, during and after employment. (ER 63-64.) The arbitration agreement specifically disclaims any status as an employment contract. (ER 63.) ("I understand that neither this agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me.").[3]

On October 23, 1995, Respondent Saint Clair Adams ("Adams") executed a copy of the arbitration agreement as part of his application for employment. (ER 55.) Following a period of employment, on November 26, 1997, contrary to the terms of the arbitration agreement, Adams sued Circuit City in a California superior court for a variety of employment-related legal claims. (ER 4-13.) Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA") and 28 U.S.C. § 1332 (1996), Circuit City filed a Petition to Stay State Court Action and to Compel Arbitration in the United States District Court for the Northern District of California ("Petition"). (SER 1-30.) On May 1, 1998, the district court granted the Petition and entered an Order staying the state court action and compelling arbitration. (ER 87-96.)

Adams appealed to the United States Court of Appeals for the Ninth Circuit. (ER 100.) The Ninth Circuit recognized that the arbitration agreement contains an ex-

[3] The Dispute Resolution Rules and Procedures contain the rules and procedures governing arbitrations conducted pursuant to the parties' agreement to arbitrate. (ER 69-80.)

press acknowledgement that it is not an employment contract. *Adams*, 194 F.3d at 1071. The Ninth Circuit also recognized that the arbitration agreement expressly states that it "in no way alters the 'at-will' status of . .. employment." *Id.* Nonetheless, the Ninth Circuit concluded that "the [arbitration] agreement was a condition precedent to [Adams's] employment," and thus, "was an employment contract, rendering the FAA inapplicable."[4] *Id.* at 1072. The Ninth Circuit based this holding on its prior decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), which held, contrary to every other federal appellate court in the United States, that the statutory exclusion found at Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), must be read broadly to exclude coverage of all contracts of employment. *See Adams*, 194 F.3d at 1071-72, *citing Craft*, 177 F.3d at 1094.

As a result, the Ninth Circuit reversed the decision of the district court compelling arbitration, and remanded the case to the district court for dismissal "because of a lack of federal authority." *Id.*

[4] This holding appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), the companion case in which a writ of certiorari also is sought. In *Ahmed*, the Ninth Circuit found the arbitration agreement at issue to be an "employment contract" even though the court expressly found that the AIRP documents stated that participation was "voluntary," and expressly held that participation in the AIRP was "*not* a condition precedent to employment." *Id.* at 1133 (emphasis added).

REASONS FOR GRANTING REVIEW

I. THE NINTH CIRCUIT'S BROAD READING OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT AMONG THE LOWER COURTS.

By holding that the district court lacked authority to compel arbitration, the Ninth Circuit has interpreted the exclusion found in Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), in a manner which directly conflicts with every other United States court of appeals. The decision also conflicts directly with the decision of a state court of last resort within the geographic area covered by the Ninth Circuit. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996). Finally, the Ninth Circuit's decision also raises an important issue not settled by the Supreme Court, which in fact has expressly been reserved by this Court.[5]

Based on a broad reading of the FAA Section One exclusion, the Ninth Circuit made the blanket pronouncement that "the FAA does not apply to labor or employment contracts," *Adams*, 194 F.3d at 1070, and further interpreted "employment contracts" broadly to encompass virtually all contracts between employers and employees. *Id.* Thus, in the Ninth Circuit's view, no agreement to arbitrate disputes entered into by an employer and an employee may be enforced pursuant to the FAA. *Id.*

[5] This Court previously has reserved the question of the proper scope to be given to the FAA Section One exclusion. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (Court leave[s] for another day the issue raised by amici curiae" as to proper scope of the FAA Section One exclusion). This question was reserved over the dissent of Justice Stevens and Justice Marshall. *Id.* at 36. As in *Gilmer*, the arbitration program at issue here also is not part of a "contract of employment." *See infra* Section II.

However, this broad reading of the FAA Section One exclusion directly conflicts with *every* other federal appellate court. Rather, every other United States court of appeals has found the FAA Section One exclusion to be narrow, applying only to employment contracts of seamen, railroad workers, and other employees actually engaged in the movement of goods in interstate commerce. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive intepretation to the exclusionary language of [FAA] Section 1."); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3rd Cir.), *cert. denied*, 522 U.S. 915 (1997) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this Section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53

n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers . . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that Section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA Section One exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA only excludes from the provisions of the Act the employment contracts of workers engaged in the transportation of goods in commerce.").

Further, since the Ninth Circuit decided *Craft*, the Seventh Circuit has considered and expressly disagreed with *Craft*. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir.), *cert. denied*, 120 S.Ct. 44 (1999) ("We acknowledge that our finding of jurisdiction [under the FAA] is in disagreement with the Ninth Circuit, which recently held that all contracts of employment are outside the scope of the FAA. However, other circuits which have addressed this issue have concluded, as we have, that such employment contracts are not excluded from the purview of the FAA.") (citations omitted).

Thus, the Ninth Circuit stands alone in its view that the FAA Section One exclusion reaches all contracts of employment. In contrast, the more logical view is that when drafting the FAA Section One exclusion, Congress

had in mind specific transportation workers for whom special arbitration legislation already existed. In *Tenney Eng'g, Inc. v. United Elec. Radio and Mach. Workers of Am.*, 207 F.2d 450 (3rd Cir. 1953), the Third Circuit Court of Appeals analyzed the scope of the FAA Section One exclusion. Considering the text of the statute as well as the legislative history, the court concluded that when the FAA originally was drafted in 1925, Congress was aware that statutory arbitration mechanisms already existed for seamen (46 U.S.C. § 651)[6] and railroad employees (Railway Labor Act § 7, 45 U.S.C. § 157 (1994 & Supp. III 1997)). *Id.* at 452, n.7, 8; *see also Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (finding FAA Section One exclusion to have been added by Congress to overcome objections of Seamen's Union). In the Third Circuit's view, Congress's addition of language regarding "any other class of worker engaged in foreign or interstate commerce" was intended:

> to include only those other classes of workers who are likewise engaged directly in commerce . . . . The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Tenney at 452-53.

As a result of the Ninth Circuit's solitary position, an intolerable conflict is presented. Specifically, employers within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands,

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[6] The seamen arbitration statute in effect when the FAA was drafted later was repealed, *see* Pub. L. 98-89, Aug. 26, 1983, leaving to seamen other statutory dispute resolution procedures. *See, e.g.*, 46 U.S.C. 10302(b) (1994).

now are precluded from relying on the FAA in federal court to enforce arbitration agreements with employees who are not transportation workers. However, employers and employees in forty-one other states and Puerto Rico may obtain precisely that relief.

Likewise, the conflict presents a predicament for large national employers like Circuit City, with operations both within and outside the geographic area covered by the Ninth Circuit. Such employers who use the same arbitration agreement for their entire workforce now are barred from seeking enforcement of arbitration agreements pursuant to the FAA in federal courts within the Ninth Circuit, while such relief is available outside the Ninth Circuit. As a result, the Ninth Circuit's position creates an intolerable conflict affecting thousands of employers and many hundreds of thousands of employees.

This conflict is not simply hypothetical, but actually exists for the petitioner. Two other federal courts of appeals have reviewed the same arbitration program under the FAA. *See Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998) (recognizing that " 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration' ") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637 (7th Cir. 1999) (enforcing the arbitration agreement under the FAA). Neither court found the agreement to arbitrate to be an "employment contract," or otherwise excluded from coverage under the FAA.

Finally, the Ninth Circuit's decision on this issue also directly conflicts with that of the Supreme Court of Hawaii, located within the Ninth Circuit's geographic

area. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996) ("[W]e believe that the narrow interpretation of the section 1 exclusion is correct . . . ."). Thus, employers and employees in Hawaii, including Circuit City, seeking enforcement of arbitration agreements under the FAA are faced with directly conflicting interpretations of the FAA, depending on whether they seek to compel arbitration in state or federal court. A definitive ruling by this Court as to the proper scope of the FAA Section One exclusion will remove these intolerable conflicts.

II. THE NINTH CIRCUIT'S BROAD VIEW OF WHAT CONSTITUTES AN "EMPLOYMENT CONTRACT" FOR PURPOSES OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT WITH SUPREME COURT AUTHORITY.

Review of the Ninth Circuit's decision is warranted for a second and separate reason. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly declined to address the issue of the appropriate scope of the FAA Section One exclusion because the arbitration agreement presented there was contained in a securities industry "U-4" registration form ("Form U-4"), required as a condition precedent to working as a broker in the securities industry, rather than in an employment contract. *Id.* at 25 n.2. As a result, the clear direction from this Court is that, regardless of the "broad" or "narrow" scope of the FAA Section One exclusion, arbitration agreements which are not "contracts of employment" are not excluded from coverage by the FAA. *Id.*

Like the arbitration agreement in a securities registration application in *Gilmer*, 500 U.S. at 25 n.2, this arbitration agreement is not contained in a contract of employment, and accordingly, the exclusionary language of FAA Section One cannot apply. Specifically, both pros-

pective licensees under the Form U-4 and prospective applicants under the arbitration agreement are required to agree to arbitrate employment-related legal claims against their employer as a condition precedent to employment. *Id.* at 25 n.2. Both agreements establish the obligation to arbitrate, but have no further impact on setting the terms and conditions of employment. (ER 62-67.) Neither agreement sets the wages, hours, working conditions, period of employment or various other terms normally found in an employment contract. (*Id.*) In fact, the arbitration agreement executed by Adams specifically disclaims any status as an employment contract. (ER 63) ("I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me. . . . If Circuit City does accept my application for employment and I become employed at Circuit City, this Agreement in no way alters the 'at-will' status of my employment."). By its own terms, then, the arbitration agreement is not an employment contract. Rather, like the Form U-4, the arbitration agreement is a separate, stand-alone agreement by which Adams agreed to arbitrate any and all employment-related legal disputes in exchange for Circuit City's agreement to consider his application for employment. Furthermore, the arbitration agreement is not a "contract of employment" because it applies not only to applicants who ultimately are hired by Circuit City, but also to unsuccessful applicants, who never become employed by the Company. *See Johnson v. Circuit City*, 148 F.3d 373, 378 (4th Cir. 1998) (finding adequate consideration for the arbitration agreement even though applicant was never hired by Circuit City).

Thus, even if the Ninth Circuit is correct (and every other federal court of appeals is wrong) in its broad reading of the scope of the FAA Section One exclusion,

the decision that Adams's agreement to arbitrate falls within the FAA Section One exclusion as a "contract[] of employment," still conflicts with this Court's opinion in *Gilmer, supra*, and with the "liberal federal policy favoring arbitration agreements" reflected in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

III. THE NINTH CIRCUIT'S DECISION IS AN ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY.

The Ninth Circuit's erroneous interpretations of (1) the scope of the FAA Section One exclusion, and (2) what constitutes a "contract of employment," have a serious and immediate impact on thousands of employers and employees. For example, Circuit City is a national company employing approximately 60,000 Associates. The Company has approximately 10,000 Associates employed in the nine states within the Ninth Circuit. If the Ninth Circuit's decision is permitted to stand, Circuit City will be in the untenable position of being permitted to move to compel arbitration pursuant to the FAA in every court except those under the authority of the Ninth Circuit.

This serious and immediate impact is not limited to Circuit City, but is shared by all businesses that employ persons both within and outside the geographic scope of the Ninth Circuit. The Ninth Circuit's erroneous rulings present for them the same intolerable conflict.

Moreover, employers who operate solely within the nine states covered by the Ninth Circuit now are deprived completely of their federal statutory right to seek enforcement in federal court of agreements to arbitrate employer-employee disputes, a right expressly granted to them by Congress when enacting the FAA, *see* 9 U.S.C. §§ 3, 4 (1994), and recognized by this Court. *See Gilmer*, 500

U.S. at 24-25. By contrast, their counterparts in forty-one other states may pursue this relief.

Lastly, under *Adams, supra*, the Ninth Circuit's view is that any agreement requiring arbitration of disputes between employers and employees is a "contract of employment" excluded from coverage by the FAA. In contrast, employers and employees outside the Ninth Circuit with such agreements are not deprived of the statutory protections and procedures available in the FAA.

By granting certiorari on the issues presented, this Court can remove the conflict currently existing and ensure a nationally uniform interpretation of the FAA's Section 1 exclusion.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to granting this Petition, Circuit City respectfully requests summary reversal of the Ninth Circuit's decision in this case.

Respectfully submitted,

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February 16, 2000

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15992

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Plaintiff-Appellee,
v.

SAINT CLAIR ADAMS,
a California resident,
Defendant-Appellant.

Argued and Submitted October 4, 1999
Filed November 18, 1999

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-98-00365-CAL
Charles A. Legge, District Judge, Presiding

JUDGES: Before: Betty B. Fletcher, Dorothy W. Nelson, and Melvin Brunetti, Circuit Judges.

OPINION

PER CURIAM:

This is an appeal from the district court's final order compelling arbitration under the Federal Arbitration Act,

9 U.S.C.A. § 1, *et seq.* (West 1999) ("FAA"). We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court, however, lacked the authority, as a matter of substantive law, to compel arbitration because the Federal Arbitration Act does not apply to this case. In *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999), we held that the FAA does not apply to labor or employment contracts.

Factual and Procedural Background

Saint Clair Adams appeals the district court's order staying the state court action and compelling abritration. Circuit City sought mutually binding arbitration under Section 4 of the FAA in response to Adams's state court lawsuit under the California Fair Employment and Housing Act ("FEHA"). On October 23, 1995, Adams completed a six-page application to work at Circuit City Stores. On pages two and three of the application, Adams signed a document titled "Circuit City Dispute Resolution Agreement" ("DRA"). The DRA requires that employees submit all claims and disputes to mutually binding arbitration.[1] An employee cannot work at Circuit City without signing the DRA. If the employee signs the DRA and then withdraws consent within three days, the employee "will no longer be eligible for emplyoyment at Circuit City."

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[1] The DRA specifies that job applicants agree to settle "all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort."

Standard of Review

The Ninth Circuit reviews de novo the district court's order compelling arbitration. See *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986). The existence of subject matter jurisdiction is a question of law reviewed de novo. See *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153 (9th Cir. 1998).

Discussion

Circuit City sought arbitration pursuant to Section 4 of the FAA and asserted jurisdiction pursuant to Section 4 and 28 U.S.C. § 1332. We recognize that the FAA is not a jurisdictional statute:

> [The FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under [§ 1331] or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.

(*Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). In this case, we need not consider whether the district court had underlying federal question jurisdiction because the FAA is inapplicable. As a threshold matter, therefore, the district court lacked the authority under Section 4 of the FAA to compel arbitration.

We must find that the FAA is inapplicable to this case under *Craft* if the DRA is an employment contract. This court has defined an "employment contract" as "an

agreement setting forth 'terms and conditions' of employment." *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994) (quoting Black's Law Dictionary 525 (6th ed. 1990)).

We find that the arbitration agreement in this case was an employment contract notwithstanding the disclaimer in the DRA. The DRA specifically states: "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me." Furthermore, it says that "this Agreement in no way alters the 'at-will' status of my employment." Though the DRA may not alter Adams's status as an at-will employee, the agreement was a condition precedent to his employment. The agreement was an employment contract, rendering the FAA inapplicable. See *Craft*, 177 F.3d at 1094. Thus, we reverse the district court's order compelling arbitration and remand to the district court for dismissal because of a lack of federal authority.

REVERSE AND REMAND.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C98-0365 CAL

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Plaintiff,

v.

SAINT CLAIR ADAMS,
a California resident,
Defendant.

Decided April 29, 1998
Filed April 29, 1998;
Entered in Civil Docket May 1, 1998

JUDGES. Charles A. Legge, United States District Court Judge.

Opinion by: Charles A Legge.

OPINION AND ORDER STAYING STATE COURT ACTION AND COMPELLING ARBITRATION AND DENYING RULE 11 SANCTIONS

THIS MATTER, having come regularly before the Court and the Court having considered the Notice of Hearing on Petition to Stay State Court Action and to Compel Arbitration; Petition to Stay State Court Action and to Compel Arbitration; Memorandum of Points and Authorities in Support Thereof; Declaration of Pamela

G. Parsons in Support of Petition to Stay State Court Action and to Compel Arbitration and exhibits therto; Defendant's Memorandum of Points and Authorities in Opposition to Motion [sic] to Stay State Court Action and to Compel Arbitration; Declaration of Saint Clair Adams in Opposition to Petition to Stay State Court Action and to Compel Arbitration and exhibits thereto; and Circuit City's Reply Memorandum in Support of Petition to Stay State Court Action and to Compel Arbitration; as well as Circuit City's Notice of Motion and Motion for Rule 11 Sanctions; Memorandum of Points and Authorities in Support Thereof; Declaration of Rex Darrell Berry in Suppot of Motion for Rule 11 Sanctions and exhibits thereto; Defendant's Memorandum of Points and Authorities in Opposition to Motion to Impose Rule 11 Sancitons; Declaration of Angela M. Alioto in Opposition to Plaintiff's Motion to Impose Rule 11 Sanctions; and Reply Memorandum of Petitioner Circuit City Stores, Inc. in Support of Motion for Sanctions; and the parties having appeared at oral argument through their respective counsel of record; and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Circuit City's Petition to Stay State Court Action and to Compel Arbitration is GRANTED. The basis for this Order is set forth in the Court's oral opinion, a copy of which is attached as Exhibit A hereto, and is incorporated by reference. The California Superior Court action entitled "Saint Clair Adams v. Circuit City Stores, Inc.; Derrick Iman; Scott Stevens; Geoff Collins and DOES 1 through 10, inclusive," Sonoma County Superior Court Case No. S-CV-217898 is hereby STAYED in its entirety pending completion of the arbitration of this dispute. All claims raised by Respondent in the Sonoma County Superior Court lawsuit Case No. S-CV-217898, are hereby compelled into arbitration pursuant to the Dispute Resolution Agreement between Respondent and Circuit City.

2. Circuit City's Motion for Rule 11 Sanctions is DENIED. The basis for this Order also is set forth in the Court's oral opinion, and is incorporated by reference.

DONE IN OPEN COURT this 29 day of April, 1998.

CHARLES A. LEGGE
United States District Court Judge

EXHIBIT A

BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

San Francisco, California

Friday, April 3, 1998

THE CLERK: Civil Action 98-0365, Circuit City Stores, Inc., versus Saint Clair Adams.

Counsel, your appearance, please.

MS. ALIOTO: Angela Alioto for plaintiff, Your Honor.

MR. ROBINSON: Steven L. Robinson with the plaintiff.

MR. BERRY: Good morning, Your Honor. Rex Berry on behalf of Circuit City, the petitioning party.

THE COURT: All right. This is the petitioner's motion to stay the state court proceedings and to compel arbitration.

I've gone over the moving and opposing papers, and does either side have anything further you'd like to add?

MR. BERRY: Only in response to whatever questions the court might have.

THE COURT: All right. I don't think it's necessary.

Counsel, do you want to add anything?

MS. ALIOTO: No, Your Honor.

THE COURT: All right. This is the petitioner's motion to compel arbitration and to stay the state court proceedings pending that arbitration.

There was a civil action filed by the respondent here against the petitioner here and three others in superior court, and the allegation is discrimination and alleged harassment by the employer based on the plaintiff's sexual orientation.

And then the petitioner, the company, has come to this court and requested a stay of the state court action and an order compelling the arbitration.

The arbitration arises from the dispute resolution agreement which was signed by—I'll refer to the respondent here and the plaintiff in the state court case as Mr. Adams—signed by Mr. Adams.

The record indicates to me that there began some employment problems that Adams brought to somebody's attention in November of 1996 and that he then left Circuit City as an employee in November of 1996 of course complaining effective discharge.

He also filed a request for arbitration when he left that I have here and I'll refer to in more detail in a moment. The record doesn't indicate that Circuit City replied to that written request for arbitration until the action is filed in state court.

Now, the first question, of course, is whether this court has jurisdiction to be entering an arbitration order; and it's clear the court has to have jurisdiction, subject matter jurisdiction, over the matter that's independent of the basic Federal Arbitration Act. That's 9 U.S. Code, Section 1.

Circuit City alleges diversity jurisdiction; and, indeed, Mr. Adams is a California resident and Circuit City is a Virginia corporation with its principal place of business in Virginia.

The complaint in state court also alleges three individual defendants as supervisors; but for purposes of diversity and for all petitions to compel, I am to consider the citizenship simply of the plaintiff and the party with whom he signed the arbitration agreement, and that is Circuit City. So I believe that I have subject matter jurisdiction.

There's no dispute that Mr. Adams signed the dispute resolution agreement, which contains this arbitration clause, when he was hired in 1995, but he raises certain arguments as to why the arbitration requirement should not be enforced.

One is that he did apparently request some arbitration in 1996 in November and didn't receive any reply to that, so he argues that Circuit City has waived it.

However, when I look at the arbitration demand, which is a letter of November 22nd, 1996, the request for arbitration just refers to an appeal of benefits. It really does not make any reference to the claims now made here; that is, that there was sexual harassment or perhaps discrimination and hostile work environment.

So since he did not raise that issue specifically in his November 22nd, 1996, demand for arbitration, I don't believe that the company has waived its right to compel arbitration in this case.

Mr. Adams also makes the argument that the arbitration agreement is an unconscionable contract of adhesion, but I believe it's clear here that the contract is to be interpreted to bind both parties, that is, Mr. Adams and the company, to arbitration.

There are, indeed, some limitations on the recovery stated in this arbitration agreement, but I don't believe that they amount to the extreme one-sidedness that's required for a finding of unconscionability as a matter of law, and I'm referring specifically to the Golenia, G-o-l-e-n-i-a case, Didonato, D-i-d-o-n-a-t-o, case, and O'Neil versus Hilton.

So in view of the strong state and federal policy, particularly the federal policy announced in the Arbitration Act, I find that the contract is enforceable.

The argument is made that this would be contrary to the Anti-Injunction Act. However, I think it's clear from the U.S Supreme Court decision in Moses Cohn, that the Anti-Injunction Act does not prevent a federal court to—from entertaining a petition to compel arbitration, and that's true even though the underlying suit—the underlying dispute to be arbitrated is one pending in state court.

So I think there is ample authority under both federal and state law for compelling arbitration even—compelling arbitration in the state court dispute and to stay a state court action pending completion of that arbitration.

That's been done in several cases. Just two examples are Williams & Associates versus McMahon and Network Cinema against Glassburn, and then also Circuit City against Gonzales in the Eastern District of California.

So for all those reasons, the motion to compel arbitration and to stay will be granted.

The motion for Rule 11 sanctions will be denied. I think the opposition is in good faith with some legal support for it; and although I'm ruling against the respondent on this matter, I do not believe it's one where Rule 11 sanctions are called for.

So I will ask the petitioner here to submit an order for signature that grants the arbitration and stays the state court proceeding.

Thank you.

MR. BERRY: Thank you, Your Honor.

MS. ALIOTO: All right. Thank you very much, Your Honor.

(Whereupon proceedings adjourned at 9:50 a.m.).

(3)

99-1379

~~No. 99-1379~~

Supreme Court, U.S.
FILED
APR 17 2000
CLERK

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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OPINIONS BELOW

In addition to the Ninth Circuit and District Court opinions reprinted in Petitioner's Appendix ("Pet. App.") 1a-11a, the Ninth Circuit's opinion in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*), *pet. for reh. denied*, which sets forth the reasoning underlying the Ninth Circuit's holding that the Federal Arbitration Act ("FAA") did not apply to respondent's employment contract, is reprinted in the Appendix to this Brief in Opposition ("Opp. App") 1a-27a.

JURISDICTION

Respondent agrees with petitioner's Statement of Jurisdiction.

STATUTES INVOLVED

In addition to the statutory provisions set out in the Petition, the "coverage" section of the FAA, 9 U.S.C. §2, is also pertinent to petitioner's first Question Presented:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

1. Respondent Saint Clair Adams ("Mr. Adams") was a salesperson employed by petitioner Circuit City Stores, Inc. ("Circuit City") at its retail electronics store in Santa Rosa, California. Excerpts of Record (ER) 4, 5. In November

1997, after suffering numerous alleged incidents of on-the-job harassment and retaliation based upon his sexual orientation, Mr. Adams filed suit in California Superior Court against Circuit City and three of its store managers under California's Fair Employment and Housing Act, Cal. Govt. Code §12900 *et seq.*, and state common law. ER 4, 14-26. Circuit City responded by filing a petition in federal district court to compel arbitration of respondent's claims under the FAA, 9 U.S.C. §1 *et seq.* Supplemental Excerpts of Record (SER) 1-30.

2. Mr. Adams had submitted an application to work at Circuit City approximately two years earlier. Pet. App. 2a. As a condition of seeking such employment, Mr. Adams was required by Circuit City to sign a form agreeing to arbitrate any dispute that might later arise with Circuit City concerning his application or his subsequent employment, and to be bound by Circuit City's dispute resolution rules "throughout the application process, my employment and thereafter." ER 62-67. The application stated, "[Circuit City] will not consider your application unless this agreement is signed." ER 62. Although Circuit City job applicants are permitted to revoke their arbitration agreements within three days after signing, the company's application form stated that applicants who revoked their arbitration agreements "no longer will be eligible for employment at Circuit City." ER 64.

The arbitration agreement signed by Mr. Adams further stated that it did not "form a contract of employment between Circuit City and me" and that the applicant's "signature to this Agreement in no way guarantees that Circuit City will accept my application for employment." ER 63.

Mr. Adams challenged the enforceability of his employment arbitration agreement in district court on the ground that Circuit City's mandatory pre-dispute arbitration procedures were one-sided and unenforceable under state unconscionability law. *See Doctor's Associates, Inc. v. Casarotto*, 517

U.S. 681, 686-87 (1996). He alleged that the mandatory arbitration clause lacked mutuality, because while employees are required to arbitrate all employment-related claims against Circuit City, the employer had no corresponding obligation to arbitrate claims it might have against the employee. ER 64. He also challenged Circuit City's dispute resolution rules, which: 1) imposed a one-year statute of limitations on all claims (ER 63); 2) required the employee to pay half the cost of any arbitration, including the arbitrator's fees, subject to later cost-shifting only at the arbitrator's discretion (ER 77); 3) placed a cap on the amount of front pay or punitive damages that the arbitrator may award; 4) prohibited the arbitrator from deciding cases on a class action basis (ER 76, 78); 5) vested complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee (ER 78); and 6) did not require the arbitrator to provide any findings or reasoning in support of the arbitration award (ER 76-77).

3. The district court rejected Mr. Adams' challenges to the Circuit City mandatory pre-dispute arbitration procedure, compelled arbitration, and enjoined Mr. Adams' state court action. Pet.App. 6a-7a. The Ninth Circuit reversed, based on its intervening holding in *Craft v. Campbell Soup Co.*, *supra*, 177 F.3d 1083 (Opp. App. 1a-27a), that the FAA did not apply to employment contracts. In *Craft*, the Ninth Circuit had undertaken a detailed textual and historical analysis of the FAA, drawing upon newly-published academic scholarship, in concluding, *inter alia*, that: 1) Congress' limitation of coverage in Section 2 of the FAA, 9 U.S.C. §2, to "contract[s] evidencing a transaction involving commerce" was intended to reach commercial contracts only and not employment contracts, both because employment contracts were not at the time considered "transactions" and because the scope of Congress' Commerce Clause power in 1925 was universally understood *not* to encompass employees unless they were di-

rectly working in interstate commerce; and 2) the exclusion in Section 1 of the FAA, 9 U.S.C. §1, which stated that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," was intended to exclude from the FAA coverage those employees who *were* directly working in interstate commerce, and who might be encompassed within the scope of Section 2's coverage provision but for the exclusion. The Ninth Circuit in the present case based its FAA analysis on *Craft* and, after finding that Mr. Adams' arbitration agreement constituted a "contract[] of employment" for purposes of the FAA, reversed the district court's order compelling arbitration on the ground that respondent's arbitration agreement was not within the scope of the FAA. Pet. App. 4a.

ARGUMENT

Circuit City seeks *certiorari* review of two questions: *first*, whether the FAA applies to any contracts of employment;[1] and *second*, whether the agreement that required Mr. Adams to arbitrate all future employment disputes with his employer, Circuit City, was part of a contract of employment within the meaning of the FAA.

1. Petitioner's second Question Presented should be dismissed as not worthy of *certiorari* review. Whether the agreement between Mr. Adams and Circuit City is a contract of employment as that term may have been understood by Congress in 1925 (when it enacted the FAA) is a fact-specific question that presents neither a conflict among the lower courts nor an issue of general significance. Moreover, that question was neither analyzed from a historical perspective

[1] *Cf.* Brief *Amicus Curiae* of the National Academy of Arbitrators at 4 n.4.

by the parties below nor was it the subject of significant briefing. Additionally, the question whether Mr. Adams' agreement constituted a "contract of employment" has little significance beyond this case; indeed, even Circuit City apparently uses different types of arbitration agreements with its employees in different stores or regions. *See Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999), *petition for certiorari filed*, No. 99-1378.

The application of the FAA to employment contracts does, as petitioner asserts, pose a question of significant importance as to which the lower courts are presently divided. That Question would not be reached, however, if the second Question were resolved as petitioner urges, because if there were no "contract of employment" in this case, it would no longer matter, for purposes of the petition, whether the FAA applied to employment contracts. *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (not reaching question of FAA's application to employment contracts).

Petitioner is incorrect in asserting that the Ninth Circuit's decision on the "contract of employment" question conflicts with *Gilmer*. The reason no contract of employment was found to be involved in *Gilmer* was because the arbitration provision at issue was set forth in a separate registration agreement between a broker and a securities exchange, *not* in an agreement between an employee and his employer. *See* 500 U.S. at 25 n.2 ("the arbitration clause at issue is in [the plaintiff's] securities registration application, which is a contract with the securities exchanges, *not* with [the employer]") (emphasis added). The arbitration agreement that Circuit City required Mr. Adams to sign, by contrast, unquestionably *is* between employer and employee, and it does, in addition, directly regulate an important term and condition of his later employment—whether he could pursue subsequent employment disputes in state or federal court rather than only in Circuit City's arbitration program.

Circuit City nonetheless contends that its employer-employee agreement with respondent is not a "contract of employment" because: 1) it is contained in an employment "application" that was executed before Mr. Adams' employment began; 2) it applies by terms not only to persons who become, and continue to serve as, employees, but also to applicants who are never offered, or who never accept, employment; and 3) the application states that it is not a contract of employment (by which the application obviously means that Mr. Adams' signature did not guarantee that he would be hired, *see* ER 63 ("my signature to this Agreement in no way guarantees that Circuit City will accept my application for employment")). Regardless of the merit of these arguments, they do not give rise to a conflict between the Ninth Circuit's decision and *Gilmer*, because none of these supposedly critical factors was present in *Gilmer*.

Thus, while the most prudent course of action for the Court might be to deny *certiorari* on *both* Questions—principally to give the lower courts more time to respond to the Ninth Circuit's decision in *Craft* and the new academic research addressing the issue—if the Court grants review it should limit *certiorari* to the first Question only.

2. As to the first Question Presented, the scope of the FAA as applied to "contracts of employment" is an issue that this Court declined to address in *Gilmer* (*see* 500 U.S. at 25 n.2; *cf. id.* at 39-41 (Stevens, J., dissenting)) but may eventually choose to resolve. Rather than granting review in the present case, however, it may be more prudent for the Court to allow more time for the lower courts to respond to the Ninth Circuit's analysis and to digest the most recent law review scholarship on the issue.[2]

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[2] Notably, of the post-*Gilmer* cases analyzing the issues presented in the first Question Presented, the only ones containing any significant analysis, other than *Craft*, are: *Cole v. Burns Int'l Securities Services*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir.), *cert. denied*, 118 S.Ct. 295 (1997); and *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir. 1995).

a. The Ninth Circuit's decision in *Craft*, and a series of law review articles by Professor Finkin[3] and others, provide a range of reasons why earlier judicial efforts to determine the breadth of the statutory coverage and exemption provisions reached a profoundly ahistorical result. We highlight but a few of these reasons:

First, the affirmative coverage of the FAA extends to "a written provision in any maritime transaction of a contract evidencing a transaction involving commerce." 9 U.S.C. §2. Although this scope-of-coverage provision is nowhere mentioned in the Petition (or in the analysis of most lower courts whose construction of the FAA differs from the Ninth Circuit's), it plays a critical role in elucidating what Congress meant by its exclusion from the FAA of "contracts of employment of . . . workers engaged in . . . interstate commerce" in Section 1, 9 U.S.C. §1. In determining the meaning of Section 1, the relevant inquiry, as *Craft* correctly points out, is not what the quoted phrase might mean in isolation, but what it means in relation to the language to which it is addressed—namely, the affirmative coverage of the FAA, from which it carves out a specific exclusion. Opp. App. 4a-6a, 8a, 18a-19a. The critical question addressed by the Ninth Circuit was whether Congress in 1925 somehow understood that an employment contract could be "a contract evidencing a transaction involving commerce" (*i.e.*, within the scope of coverage) and yet *not* be a "contract of employment of seamen,

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[3] See, e.g., Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Empl. & Lab. L. 282 (1996); Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 Lab. L. J. 329 (1997).

railroad employees, or any other class of workers engaged in foreign or interstate commerce" (*i.e.*, not exempt from coverage), and thus whether Congress meant specifically to preserve FAA coverage of such employment contracts.

To conclude that Congress intended employment contracts to be in commerce for scope-of-coverage purposes yet not in commerce for exclusion purposes would be historically anomalous. In 1925, when the FAA was enacted, the reach of Congress' Commerce Clause power with respect to employment relations was thought to be quite narrow. Opp. App. 7a-9a. At the least, any effort by Congress in 1925 to extend the FAA to contracts of employment affecting workers *other than those who were directly involved in transporting goods in interstate commerce* would have been of questionable constitutional validity. By contrast, a decision to extend coverage only to employees who were directly engaged in such transportation would not have been open to serious challenge. Viewed from the perspective of 1925, the decision by Congress that petitioner presumes—limiting the FAA's coverage only to those employment contracts *least* evidently within the reach of federal authority—would have been a curious choice at best.

Second, although several of the lower court decisions cited by petitioner focus on the linguistic difference between the phrase "engaged in . . . commerce" (§1) and "involving commerce" (§2), there is a perfectly good syntactical explanation for the use of slightly different language in the coverage provision and in the exclusion, which negates any conclusion that Congress *must* have intended thereby to draw a substantive distinction between the types of workers engaged in "commerce" for purposes of the two sections. Use of the same introductory clause in both contexts would have created a grammatical problem, since a "transaction" cannot be said to be "engaged in" commerce, any more than a "class of workers" can be "involving commerce." Given the historical

context in which these sections were drafted – *i.e.*, a time when the constitutional coverage of commerce was considered to be quite narrow and the distinction between various locutions regarding the requisite connection to commerce had not been developed – it is more logical that the different phraseology was driven by considerations of draftsmanship rather than an intent to signal a major substantive distinction between the two connectives to "commerce." Those courts to conclude otherwise have engaged in anachronistic reasoning, projecting an understanding of modern Commerce Clause jurisprudence onto the 1925 Congress.

Third, as the Ninth Circuit concluded in *Craft*, most earlier efforts by lower courts to discern Congress' intent "reasoned backward and so got it wrong." Opp. App. 19a, *quoting* Finkin, 17 Berkeley J. Empl. & Lab. L. at 291. Those courts improperly inferred from the existence of the Section 1 exclusion that the FAA's drafters must have intended Section 2 to cover employment contracts in the first place. But historical documents demonstrate that the concern of the FAA's drafters was with commercial contracts only, and the drafters' view at the time was that the Section 2 coverage provision—which was drafted before the Section 1 exclusion – would *not* reach employment contracts, even without the exclusion. *See* Opp. App. 7a-8a; Finkin, 17 Berkeley J. of Empl. & Lab. L. at 283-86. The exclusion language in Section 1 was added to the bill later, as a response to protests from organized labor that workers' contacts might still be covered. Opp. App. 14a-15a. Nothing in the FAA's legislative history suggests that Congress ever intended the statute to reach *any* employment contracts. If Congress excluded some workers from the FAA but included others, that distinction escaped any notice at the time, and there is no expression of such intention in the legislative history. Finkin, 48 Lab. L. J. at 331-32.

b. Although petitioner emphasizes the urgency of prompt *certiorari* review, employers in the Ninth Circuit will not be

left in an "intolerable" situation, as petitioner asserts, if this Court allows the lower courts additional time to consider the scope of the FAA exclusion. *See* Petition at 13. Such a result would merely leave the enforceability of arbitration provisions in employment contracts to be governed by *state law*, which has traditionally governed the employment relationship.

What apparently concerns Circuit City is that if the Ninth Circuit's analysis were correct, the States would have the power to exercise their police powers to protect their workers by barring the enforcement of arbitration agreements imposed as a condition of employment, or by subjecting such agreements to special scrutiny for unfairness. The FAA, if applicable to employment contracts, would preempt the States from exercising their police powers in this manner. *See Perry v. Thomas*, 482 U.S. 488 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). But the FAA's preemptive impact on state law provides an additional reason to ensure that the *Craft* analysis receives full consideration by the lower courts. This Court has "worked on the assumption that the historic police powers of the States were not to be superceded by [federal law] unless that was the *clear and manifest* purpose of Congress." *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 325 (1997) (emphasis added; citations and internal quotation marks omitted). At the least, the Ninth Circuit's analysis in *Craft* casts serious doubt on whether Congress in 1925 had such a "clear and manifest" intent to preempt state law with respect to employment contracts.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied, or if granted, review should be limited to the first Question Presented.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 98-15060

ANTHONY I. CRAFT,
Plaintiff-Appellee,

v.

CAMPBELL SOUP COMPANY,
Defendant-Appellant.

Argued and Submitted Aug. 10, 1998

Filed Dec. 2, 1998

Amended May 27, 1999

Appeal from the United States District Court for the Eastern District of California Garland E. Burrell, District Judge, Presiding, D.C. No. CV 96-1500-GEB.

Before: BRUNETTI, TASHIMA, and GRABER, Circuit Judges.

ORDER

PER CURIAM.

A judge of this court called for en banc review. A vote was taken and a majority of the non-recused active judges did not vote in favor of en banc review. The *sua sponte* call for en banc review is therefore DENIED.

The opinion filed on December 2, 1998, 161 F.3d 1199, is amended in accordance with the amended opinion attached hereto.

OPINION

We must decide the threshold issue of whether we have jurisdiction to hear Campbell Soup Company's ("Campbell Soup") interlocutory appeal from the district court's denial of its motion for summary judgment. Because we conclude that appellate jurisdiction is lacking, we dismiss the appeal.

As there is no final judgment or any other applicable exception to the final judgment rule, this court has jurisdiction only if the Federal Arbitration Act ("FAA") applies. *See* 9 U.S.C. § 16 (providing for interlocutory appeal under the FAA). Our jurisdiction therefore hinges on the proper interpretation of the FAA in relation to employment contracts, which is a question of first impression in our circuit. *See Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 n. 2 (9th Cir.1998) ("Whether § 1 of the FAA broadly excludes arbitration agreements within contracts of employment is an open question in this circuit.") (citing *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 759 n. 4 (9th Cir.1997), *cert. denied*, __U.S.__, 118 S.Ct. 1511, 140 L.Ed.2d 665 (1998)).

I.

Anthony I. Craft was an employee of Campbell Soup and a member of the Food Process Workers and Warehousemen and Helpers Local Union 228 ("Union"), The collective bargaining agreement ("CBA") between Campbell Soup and the Union includes a nondiscrimination clause which provides in part that "[d]isputes under this provision shall be subject to the grievance and arbitration procedure [provided in the CBA]." [1]

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[1] The nondiscrimination clause provides:

> The Company and the Union do not and will not discriminate against employees because of race, color, religion, sex, age, or national origin. The Company offers equal employment, transfer and promotional opportunities regardless of race, color, religion, sex, age or national origin. All employment practices are to be conducted in a nondiscriminatory manner, all hiring, promotion practices, and other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion, national origin, handicap or service in the Armed Forces in accordance with applicable Federal and State laws. Disputes under this provision shall be subject to the grievance and arbitration procedure.

CBA, ¶ 26.1.

Craft filed a grievance alleging racial discrimination, harassment, health and safety concerns, and other claims. The grievance was not resolved in the initial grievance stages and the Union referred it to arbitration. While the grievance was still pending, Craft filed this action in district court. He alleged claims for race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and state law claims for assault and emotional distress.[2]

The district court granted Campbell Soup summary judgment on Craft's state law claims. Following the majority view, however, the court held that arbitration of Craft's Title VII claims could not be compelled.[3] Accordingly, it denied Campbell

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[2] At the arbitration, the arbitrator was concerned about the parallel judicial and arbitral proceedings and correctly noted a circuit split on his authority to resolve Craft's race discrimination claims. Ultimately, the arbitrator decided that Craft's claims under the CBA were so intertwined that the Union had to submit the entire grievance to arbitration or withdraw it.

[3] *See Doyle v. Raley's, Inc.*, 158 F.3d 1012, 1015 n. 3 (9th Cir.1998) (gathering cases and noting circuit split). In *Wright v. Universal Maritime Serv. Corp.*, __ U.S.__,__-__, __ n. 1, 119 S.Ct. 391, 392-93, 395 n. 1, 142 L.Ed.2d 361 (1998), the Supreme Court declined to consider the applicability of the FAA in a case which presented "the question whether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*"

Soup's summary judgment motion as to those claims. Campbell Soup appeals that interlocutory order denying its motion for summary judgment on Craft's Title VII claims.[4]

II.

A.

"When interpreting a statute, this court looks first to the words that Congress used." *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir.1998). "Rather than focusing just on the word or phrase at issue, this court looks to the entire statute to determine Congressional intent." *Id.* Applying those principles here, we begin with § 2 of the FAA, which provides for the enforcement of certain arbitration provisions:

> A written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).

The FAA does not define the phrase "contract evidencing a transaction involving commerce," so we turn to the "ordinary, contemporary and common meaning" of that phrase. *See United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir.1998). A collective bargaining agreement or an individual employment

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[4] Both parties assume that Campbell Soup's motion for summary judgment was a *de facto* petition under 9 U.S.C. § 4 for an order to compel arbitration. Although Campbell Soup's motion does not mention this section, we agree that it was functionally equivalent to a motion to compel arbitration.

contract would not seem to fall within the ordinary concept of a contract "evidencing a transaction," even if it involves interstate commerce.

As pertinent, when Congress passed the FAA in 1925, the term "transaction" commonly meant "[a] business deal; an act involving buying and selling." *Webster's Int'l Dictionary* 2688 (2d ed. unabridged 1939). *See also The Century Dictionary and Cyclopedia* 6426 (revised and enlarged ed.1911) ("1. The management or settlement of an affair; a doing or performing: as, the *transaction* of business.-2. A completed or settled matter or item of business. . . ."). An employment relationship, however, is not commonly referred to as a "business deal" or as "an act involving buying and selling." Instead, the connotation of the phrase "transaction involving commerce"—as Congress would have understood it in 1925—was of a commercial deal or merchant's sale. Therefore, the coverage section of the FAA, § 2, appears not to encompass employment contracts at all. *See* Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv.L.Rev. 591, 599 (1954) ("It is hard enough to think of any collective bargaining agreement or employment contract as evidence of a transaction involving commerce.") (internal quotation marks omitted); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L.Rev. 469, 557 (1993) ("[T]he FAA's reference to 'transaction involving commerce' might not have been understood in 1924 as including employment contracts.").

Section 1 of the FAA, however, contains definitions and, with respect to "commerce," concludes that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This latter provision might suggest that Congress intended for § 2 to apply to some collective bargaining agreements and employment contracts. Viewed as a whole, the statute is ambiguous.

Courts have developed two interpretations of these provisions: (1) Congress did not intend for the FAA to apply to any employment contracts; and (2) Congress intended for the FAA to apply to all employment contracts, except for the contracts of employees who actually transport people or goods in interstate commerce. Craft does not actually transport people or goods in interstate commerce. Thus, if the latter view applies, the FAA governs this action, and we have jurisdiction to decide this appeal. If, on the other hand, the FAA does not apply to employment contracts, then the FAA's interlocutory appeal provision, 9 U.S.C. § 16(a)(1)(B), would not give us jurisdiction to decide this appeal.[5]

B.

Courts that have adopted the latter view have relied on a contemporary understanding of the terms used in the FAA.[6] The

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[5] Campbell Soup argues that §2 of the FAA contains a broad policy favoring arbitration.

Thus, interpreting the FAA to exclude employment contracts would conflict with that policy. However, the argument is circular; the very question to be answered is whether § 2 and its broad policy apply to employment contracts at all. *See Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) ("Section 2, therefore, embodies a clear federal policy of requiring arbitration *unless* the agreement to arbitrate is not part of a contract" satisfying the requirements of that section.) (emphasis added). We decline to bootstrap a policy argument to expand the scope of § 2.

[6] The majority of circuits have interpreted the FAA to apply to all employment contracts, except for the contracts of employees who actually transport people or goods in interstate commerce. *See McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir.1998) (ignoring conflicting precedent in *United Food Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989)); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir.1997) (ignoring conflicting precedent in *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067-68 (4th Cir.1993)); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356-58 (7th Cir.), *cert. denied*, ——U.S.——, 118 S.Ct. 295, 139 L.Ed.2d 227 (1997); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1470-72 (D.C.Cir.1997); *Rojas v. TK*

FAA, however, is not a modern statute. As noted above, the FAA, including §§ 1 and 2, was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s. Thus, to understand whether Congress intended for the FAA to apply to employment contracts, we need to understand Congress' commerce power in 1925.

Before Congress enacted the FAA, the Supreme Court decided *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918), overruled by *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). In *Hammer*, the Court invalidated a federal child labor law, holding that Congress' commerce power did not extend to intrastate employees whose work involved interstate commerce. *Hammer* defined the scope of the Commerce Clause as quite limited:

> Commerce consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities. The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof.
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> Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production

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Communications, Inc., 87 F.3d 745, 747-48 (5th Cir.1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir.1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir.1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir.1971); *Tenney Eng'g, Inc. v. United Elec. Workers, Local 437*, 207 F.2d 450, 452-53 (3d Cir.1953). A few courts, however, have held that the FAA does not apply to any employment contracts. See *Domino Sugar Corp.*, 10 F.3d at 1067-68; *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1120 (3d Cir.1993) (ignoring conflicting Third Circuit precedent in *Tenney*), *United Food Workers*, 889 F.2d at 943-44.

> of articles, intended for interstate commerce, is a matter of local regulation.

Id. at 272, 38 S.Ct. 529 (citation and internal quotation marks omitted). Similarly, in *Howard v. Illinois Cent. R.R.*, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed.2d 297 (1908) (the first employer liability case), employees not directly working in interstate commerce were deemed outside of Congress' Commerce Clause power. *Howard* rejected the idea that "one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress," *id.* at 502, 28 S.Ct. 141, and held the employer liability act unconstitutional because it included subjects outside of Congress' constitutional power to regulate, *id.* at 504, 28 S.Ct. 141.

This narrow understanding of Congress' Commerce Clause power continued through the period of the drafting and enacting of the FAA. In *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 464-65, 44 S.Ct. 623, 68 L.Ed. 1104 (1924), the Court held that an illegal strike of leather workers preventing the manufacture of goods did not interfere with interstate commerce, as it did not interfere with the "free transport and delivery of the products." Thus, Congress' Commerce Clause power at the time of the FAA's enactment was limited to employees who actually transported people or goods in interstate commerce.

Under these circumstances, when Congress drafted § 2, that section could only apply to those employees. Section 1, however, exempts those very same employees from the scope of the FAA. Thus, when Congress drafted the FAA in 1925, the Act did not apply to any labor or employment contracts. *See Arce v. Cotton Club of Greenville, Inc.*, 883 F.Supp. 117, 123 (N.D.Miss.1995) ("[I]nterstate commerce at the time the FAA was enacted was generally understood to be limited to maritime and railroad transactions. Thus, when Congress excluded employment contracts of maritime and railroad workers, it resulted

in voiding the power to enforce arbitration clauses of most employment contracts. With the addition of the catch-all phrase 'or any other class of worker engaged in foreign or interstate commerce,' *all employment contracts would have been excluded from the arbitration enforcement power of the FAA.")* (emphasis added). See also Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 Labor L.J. 329, 334 (1997) ("[W]hen the Act was passed in 1925, Congress excluded all contracts of employment over which it then had jurisdiction.").[7]

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[7] *See also* Sarah Rudolph Cole, *Incentives and Arbitration; The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U. Mo. K.C. Rev. 449, 468 (1996) ("[A]t the time the FAA was passed, the language was intended to exclude contracts of employment from its purview."); Cox, 67 Harv. L.Rev. at 598 ("At that time [1924] no one supposed that there was federal power to regulate employment relations in industries producing goods for commerce or industries affecting commerce, and the phrase 'any other class of workers engaged in interstate commerce to foreign commerce might well have been considered broad enough to reach every contract of employment subject to federal regulation. Consequently, it would seem equally accurate historically and equally permissible textually to read the words either as coextensive with the constitutional power of Congress however defined or else limited to the few types of employment believed subject to federal regulation in 1924."); Finkin, 48 Labor L.J. at 333 ("The reach of Congressional power over employment contracts in 1925 was quite narrow . . . . In 1925, Congress had no power to legislate regarding contracts of employment of accountants or secretaries even if they worked for railroads or steamship companies, or of deliverymen. if they did not cross state lines. It was irrelevant whether or not the statute dealt with employees 'in' interstate commerce, 'engaged in' interstate commerce or who were 'involved in,' interstate commerce, for however the statute was phrased, these employees were wholly outside the power of Congress to regulate at the time and Congress could not have intended to include them."); Donna Meredith Matthews, *Employment Law After Gilmer: Compulsory Arbitraton of Statutory Antidiscrimination Rights*, 18 Berkeley J. Emp. & Lab. L. 347, 368 (1997) ("Logically, one could argue that the FAA reaches employment contracts only by way of the Commerce Clause, and that when the FAA was enacted in 1925 commerce was still narrowly defined. Thus, this exclusion clause was intended to assuage concerns by the very

Moreover, these are not mere theoretical musings, as demonstrated (for example) by the court's decision in *San Carlo Opera Co. v. Conley*, 72 F.Supp. 825 (S.D.N.Y.1946). In *Conley*, an opera singer entered into an employment option contract that included an arbitration clause. *Id.* at 826-27. The singer agreed to work for the employer once he was released from the military. *Id.* at 826. As part of his contract, the singer would perform throughout the country. *Id.* at 831. Thereafter, a dispute arose and the employee filed an action under the FAA. *Id.* at 827-28. The court, however, held that the FAA did not apply to the contract:

> [P]ersonal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.
>
> * * * *
>
> Since the contract does not evidence a transaction arising out of interstate or foreign commerce as set forth in Section 2 of the [FAA] this court would have no authority to compel arbitration. . . .

Id. at 831-32, *aff'd*, 163 F.2d 310, 311 (2d Cir.1947) (per curium) ("We have nothing to add to Judge Leibell's discussion of the question of jurisdiction. . . . We concur.") (citations omitted).

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employees who might be affected—those engaging in interstate commerce. Because the Commerce Clause did not reach other employment contracts, they were unaffected by the FAA.") (footnote omitted); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. Disp. Resol. 259, 294 (1991) ("The evidence suggests, however, that the 1925 Congress would have considered all workers subject to the commerce power as within the employment exclusion.").

As is evident, the court held that the FAA did not apply to the employment contract *because of § 2's coverage provision* and not because of § 1's exclusion. Of course, today, the opera singer would be within Congress' Commerce Clause power. Thus, the opera singer's contract would be subject to arbitration under the FAA if Campbell Soup's interpretation of the Act is correct.

But Campbell Soup's interpretation of the FAA would require us to hold that Congress intended to *include* some employment contracts within the scope of the FAA *prospectively*, even though it *initially excluded* all employment contracts. That approach attributes to Congress the ability to forsee the New Deal's expansion of the Commerce Clause. We refuse to adopt such an interpretation without any indication that Congress actually had such a counterintuitive intent. As Professor Epstein has observed:

> The 1925 reading of the commerce clause gave to the phrase "involving commerce" a reading that reached the instrumentalities of interstate commerce, but not retail trades and manufacturing. Because the original coverage was so defined, it was easy to read the tag end of the employee exemption in harmony with the basic coverage provision. The only workers whose contracts were shielded from arbitration were those who plied the narrow paths of interstate and foreign commerce before 1937. Since the FAA itself does not reach manufacturing and retail trades, the exemption is coordinated with the basic provision.
>
> Come the undeniable transformation of 1937, and what should be done to the pre-1937 statute? The phrase "involving commerce" has now been recast to cover all productive activities. The only way to reach this conclusion is to assume that Congress meant for the FAA to grow in scope with the commerce power, even when Congress was

quite mistaken (along with everyone else) about its prospects for growth. . . .

. . . But once the FAA is (mistakenly) expanded, what fate befalls its exclusion?

. . . Under current law, the right answer is that the FAA keeps to its 1925 contours. . . . By venturing into the waters of partial translation, both sides to the present dispute get the arguments confused. First they wrongly expand the coverage "involving commerce" to keep the FAA in play; then they give the 1925 exemption its 1925 plain meaning.

Richard A. Epstein, *Fidelity Without Translation,* 1 Green Bag 2d 21, 27-29 (1997).[8]

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[8] *See also* Robert C. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?,* 15 Hofstra Lab. & Emp. L.J. 345, 364 (1998) ("[T]he choice Congress made in 1925 was to exclude from the scope of the FAA all contracts of employment that they felt would lie within their power to regulate, namely workers engaged in the movement of goods. Viewed in this way, the exclusion from coverage should be interpreted to be as broad as the category of employment contracts within the sphere of Congressional power today.") (footnote omitted); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification,* 17 Berkeley J.Emp. & Lab. L. 282, 298 (1996)("The [FAA] exempts contracts of employment, all contracts of employment, over which Congress had constitutional authority. The scope of the commerce power when the [FAA] was enacted was quite narrow; in the employment setting, it was limited largely to transportation workers. Thus, in 1925,the [FAA] could not have applied to an arbitration provision in the employment contract of a neo-natal physician, a manufacturing manager, or a secretary in a law firm, because these employees would not have been considered as being in interstate commerce. As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it, leaving the status of employees' contracts in practical effect just as they were when the Act passed. The contrary (though currently prevailing) view produces an anomaly.") (footnotes omitted).

C.

To determine whether Congress intended for the FAA to apply prospectively to some labor and employment contracts, even though it did not apply to any at its enactment, we next turn to legislative history. *See Moyle v. Director, Office of Workers' Comp. Programs,* 147 F.3d 1116, 1120 (9th Cir.1998) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation.") (citation and internal quotation marks omitted), *cert. denied,*—U.S.—, 119 S.Ct. 1454, 143 L.Ed.2d 541 (1999). We hold that the legislative history supports the conclusion that we have tentatively reached from interpreting (a) the statutory term "transaction" and (b) the scope of Congress' commerce power as understood in 1925.

Specifically, the legislative history demonstrates that the Act's purpose was solely to bind merchants who were involved in commercial dealings. *See Local 205, United Elec. Workers v. General Elec. Co.,* 233 F.2d 85, 99 (1st Cir.1956) (noting that "congressional attention was being directed at the time solely toward the field of commercial arbitration"), *aff'd on other grounds,* 353 U.S. 547, 77 S.Ct. 921, 1 L.Ed.2d 1028 (1957). Before the Senate Committee on the Judiciary held hearings on the FAA, the draft bill made valid and enforceable "a written provision in *any contract or* maritime transaction *or* transaction involving commerce to settle by arbitration a controversy thereafter arising."[9] *See, e.g., Sales and Contracts to Sell in Interstate*

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[9] Section 2 of that draft bill provided in full:

That a written provision in any contract or maritime transaction or transaction involving commerce to settle by arbitration a controversy thereafter arising between the parties out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, en-

and Foreign Commerce, and Federal Commercial Arbitration, Hearings on S. 4213 and S. 4214 before a Subcomm. Of the Senate Comm. On the Judiciary, 67th Cong. 1 (1923) (emphasis added) ("67th Cong."). *See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (citing the original wording of the FAA). That draft of the bill thus applied to all contracts and did not contain the employment exclusion later codified in § 1.

At the hearing, the chair of the ABA committee that drafted the bill that became the FAA,[10] W.H.H Piatt, testified that the bill was partly in reaction to intense judiciary hostility toward arbitration of merchants disputes. 67th Cong. at 8 (1923) (statement of W.H.H. Piatt). Despite that purpose, concern was expressed over whether the bill would apply to workers' contracts. *Id.* Piatt emphasized that the bill was not intended to apply to those contracts:

> It is not intended that this shall be an act referring to labor disputes *at all*. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.

Id. at 9 (emphasis added).[11] However, Piatt suggested that, if Congress felt that "there is any danger of that," they could add an employment exclusion. *Id.*

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forceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

S. 4214, 67th Cong. § 2 (1922).

[10] The bill that became the FAA was drafted by the ABA Committee on Commerce, Trade and Commercial Law. See *Tenney*, 207 F.2d at 452 & n. 5 (citing H.R.Rep. No. 96, 68th Cong., 1st Sess., p. 1).

[11] Piatt also went out of his way to state that he "would not favor any kind of legislation that would permit the forcing a man to sign that kind of contract. . . . [I]t is the primary end of this contract [sic: bill] that it is a contract between merchants one with another, buying and selling goods." *Id.* at 10.

Before that same committee, the Secretary of Commerce, Herbert Hoover, similarly suggested that, if Congress wanted to ensure that "workers' contracts" were excluded from the bill, "it might well be amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.' " *Id.* at 14. Thereafter, Congress amended what became § 2 of the FAA so that it applied only to "contracts evidencing a transaction" (not to all contracts) and added the employment exclusion.

As can be seen from the hearing before the Senate Committee on the Judiciary, as well as from the subsequent amendments that Congress made to the proposed legislation, the FAA was part of an effort to gain uniformity in the application of agreements to arbitrate sales and commercial disputes. Congress never intended for the FAA to apply to employment contracts of any sort. *See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir.1991) ("A review of the legislative history of the FAA confirms that the FAA was never meant to incorporate employment contracts . . . .", *not followed as dictum in Asplundh*, 71 F.3d at 597.[12]

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[12] *See also* Heidi M. Hellekson, *Taking the "Alternative" Out of Dispute Resolution of Title VII Claims: The Implication of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N. Dak. L.Rev. 435, 446 (1994) ("This legislative history indicates that Congress's intent when enacting the FAA was to exclude all employment contracts from the Act's coverage."); Amy L. Ray, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L.Rev. 441, 446-47 (1998) (reaching the same conclusion).

D.

While neither this court nor the Supreme Court has definitely ruled on whether the FAA applies to labor and employment contracts, both courts have suggested that it does not. In *Textile Workers Union v. Lincoln Mills,* 358 U.S. 448, 77 S.Ct. 923 (1957), and *General Elec. Co. v. United Elec. Workers,* 353 U.S. 547, 77 S.Ct. 921, 1 L.Ed.2d 1028 (1957), although the Court enforced the arbitration agreements at issue, it did so under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), and not under the FAA. *See Lincoln Mills,* 353 U.S. at 548. In dissent, Justice Frankfurter highlighted the importance of that distinction:

> Naturally enough, I find rejection though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for "contracts of employment," were available, the Court would hardly spin such power out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts.

Lincoln Mills, 353 U.S. at 466-67, 77 S.Ct. 923 (Frankfurter, J., dissenting).

More recently, in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the Court faced an arbitration clause in a New York Stock Exchange securities form. The Court declined to address whether the FAA applied to employment contracts, because the securities agreement was not such a contract. *See id* .at 25 n. 2, 111 S.Ct. 1647. However, the dissent reached that issue and concluded that

Congress did not intend for the FAA to apply to employment contracts at all. *See id.* at 39-41, 111 S. Ct. 1647 (Stevens, J., dissenting) ("[T]he FAA specifically was intended to exclude arbitration agreements between employees and employers.").[13]

We have repeatedly noted the Supreme Court's reluctance to hold the FAA applicable to labor disputes. *See Local 1020 of the United Brotherhood of Carpenters & Joiners of Am. v. FMC Corp.,* 658 F.2d 1285, 1290 (9th Cir.1981) ("We note the reluctance of the Supreme Court to hold that the Federal Arbitration Act, 9 U.S.C.§ 1, *et seq.,* is applicable to arbitration proceedings involving labor disputes. . . ."). *See also American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Serv.,* 861 F.2d 211, 215 n. 2 (9th Cir.1988) ("Neither the Supreme Court nor this court has ever expressly held the Federal Arbitration Act applicable to arbitration of labor disputes.").

We have also stated our own inclination not to apply the FAA to those disputes. *See Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.,* 935 F.2d 1019, 1024 n. 2 (9th Cir.1991) (citing *Misco,* 484 U.S. at 40, 108 S.Ct. 364) (noting, in dictum, that "labor arbitration . . . is not covered by the FAA"); *American Postal Workers,* 861 F.2d at 215 (indicating that Congress

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[13] The Supreme Court also suggested that the FAA does not apply to labor contracts in *United Paperworkers Int'l Union v. Misco,* 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). There, the Court analyzed an arbitration provision in a collective bargaining agreement for production and maintenance employees at a paper-converting plant. *Id.* at 31-33, 108 S.Ct. 364. Although the employees did not transport people or goods in interstate commerce, the Court nevertheless relied on the FAA *only by anology:*

> The Arbitration Act does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases. . . .

Id. at 40 n. 9, 108 S.Ct. 364.

did not mean the FAA to be used to review arbitration awards involving collective bargaining agreements); *Kemner v. District Council of Painting and Allied Trades No. 36*, 768 F.2d 1115,1118 n. 1 (9th Cir.1985) (stating a similar principle); *San Diego County Dist. Council of Carpenters v. Cory*, 685 F.2d 1137, 1141 (9th Cir. 1982) (stating a similar priciple); *FMC Corp.*, 658 F.2d at 1290 (citing approvingly Justice Frankfurter's dissent in *Lincoln Mills).*

Binding precedent thus supports, albeit not strongly, the conclusion that we have reached from interpreting (a) the statutory term "transaction," (b) the scope of Congress' Commerce power as understood in 1925, and (c) the legislative history of the FAA.

E.

The interpretation of the FAA has remained confused, however, because many courts (and the dissent here) have focused on the FAA's exclusion provision, § 1, and not its coverage provision, § 2. However, when interpreting a statute, we logically should look first to the coverage provision (regardless of its number).[14]

As noted, the "transaction" requirement suggests that Congress did not intend for § 2 to apply to any employment contracts. At its broadest, however, Congress intended for § 2 to apply only to contracts of workers who transport people or goods in interstate commerce—the full reach of its commerce

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[14] Suppose that Section 2 of an act prohibits all federal felons from possessing a firearm, but Section 1 of the act excludes any person who was convicted of a non-violent felony. If one looks at the exclusion, one might think that the act prohibits state felons who were convicted of violent felonies from possession of a firearm. However, if one looks at the coverage provision, it is apparent that the act does not apply to any state felons. Similarly, here, we cannot interpret the scope of the FAA accurately without beginning with the provision that defines its coverage. § 2.

power in 1925. In § 1, Congress excluded those same workers from the reach of the FAA. Reading § 2 and § 1 together, as we must, demonstrates that Congress did not intend for the FAA to apply to any employment contracts. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201, 76 S.Ct. 273, 100 L.Ed.199 (1956) (holding that courts must read the provision of the FAA together, because "[s]ections 1, 2, and 3 are integral parts of a whole").

Other circuits (and the dissent here) have refused to follow that approach, which is why they have reached the wrong result. In the process, they have provided anachronistic "explanations" in support of their conclusions that the FAA applies to some employment contracts.

One such explanation, cited by Campbell Soup, was provided by the Third Circuit in *Tenney,* which concluded that the Act excluded only those workers for whom there already was special arbitration. 207 F.2d at 452-53. As Professor Finkin has argued, however, "the court reasoned backward and so got it wrong." Finkin, 17 Berkeley J. Emp. & Lab. L. at 291. Congress could not have intended for the FAA to exclude only employees who already had existing arbitration procedures available, because transportation workers had no alternative arbitration system at the time. *Id.* Only seamen and railroad workers had arbitration alternatives and, if Congress wanted to limit the exclusion clause to these groups, it would have done so explicitly. Transportation workers were a large and important part of interstate commerce during the early 1920s and unquestionably a critical subject of Congress' interstate commerce power. Further, the visibility of these enterprises politically was increased by the legal contest over their regulatory status at the time. *See id.* The exclusion of these workers could not be justified by an alternate arbitration system. That being so, we decline to adopt that anachronistic "explanation."

Campbell Soup also relies on the rule of *ejusdem generis* to interpret narrowly the employment exclusion. The rule of *ejusdem generis* "limits general terms which follow specific ones to matters similar to those specified." *Cole*, 105 F.3d at 1471. Accordingly, the general phrase "any other class of workers engaged in foreign or interstate commerce" in the exclusion clause takes its meaning from the specific terms preceding it—"seamen" and "railroad employees"—and includes only those other classes of workers who, similarly, are working in commerce. *Id.*

This line of reasoning, however, is inapplicable to the FAA. As indicated above, this approach impermissibly focuses solely on § 1, without first taking a step back and looking at § 2. Moreover, as the dissent in *Tenney* convincingly argues:

> Since the intention of Congress manifestly was to confine the Act to commercial disputes, ejusdem generis has no possible relevancy here. As said in *Gooch v. United States*, 297 U.S. 124, 128, 56 S.Ct. 395 [1936], it [the rule of ejusdem generis] may not be used to defeat the obvious purpose of legislation.

Tenney, 207 F.2d at 458 (McLaughlin, J., dissenting) (citations and internal quotation marks omitted). The meaning of § 2, the 1925 scope of Congress' commerce power, and the legislative history of the FAA demonstrate the obvious scope and purpose of the FAA, which *ejusdem generis* cannot be used to defeat.

Campbell Soup also relies on the textual argument from *Cole* and (a similar case from the Sixth Circuit, *Asplundh)* to maintain that the use of the term "engaged in" interstate commerce in § 1 points to a much narrower construction than the use of the term "involving" commerce, found in § 2 of the FAA. *See Cole*, 105 F.3d at 1471-72, *Asplundh*, 71 F.3d at 601. To arrive at this distinction, the court in *Cole* relied on *Terminix*, 513 U.S. at 273-74, 115 S.Ct. 834, which held that the term "involving" commerce is as broad as the term "affecting" commerce (i.e.,

the term expresses the full reach of the Commerce Clause). Thus, while the term "involving" interstate commerce, in § 2, dictates the full reach of Congress' commerce power, the phrase "engaged in . . . interstate commerce," in § 1, has a narrower meaning, reaching only those workers who are transporting people or goods in interstate commerce. *See Cole*, 105 F.3d at 1471-72.

As Professor Finkin points out, however:

> The difficulty [with this interpretation] is that the distinction has no support in either the law of the period or the history of the Act. On the law, there is no doubt that by the 1940s the Supreme Court had expanded the Commerce power to reach a class of workers who "affected" commerce even though they were not engaged in it; but it is dubious, at the very least, that distinction was well recognized in 1924.

Finkin, 17 Berkeley J. Emp. & Lab. L. at 294. Emphasizing the same point, other commentators have suggested that Congress used different terms in the two provisions solely because of grammar:

> [I]t is unlikely that the different wording of both sections, "involving Commerce" as opposed to "engaged in commerce," arose out of anything other than grammatical necessity. . . . [I]t would have been incorrect for Congress to have stated that the transaction was "engaged" in commerce or have referred to "a class of workers involving Commerce."

Hellekson, 70 N. Dak. L.Rev. at 445 & n. 89 (citations omitted).

Courts that have made these kinds of textual distinctions have relied entirely on post-New Deal cases to support the difference between "engaged in" and "involving" commerce. *See* Finkin, 17 Berkeley J. Emp. & Lab. L. at 303 n. 55. Because it is apparent that Congress did not intend for the FAA to apply to

employment contracts, we decline to adopt that anachronistic "explanation."

We also reject other circuits' reliance on *Terminix*. In *Terminix*, the Supreme Court held that Congress' use of the term "involving commerce" in § 2 indicated its intent for the term to expand as Congress' commerce power expanded. 513 U.S. at 273-75, 115 S.Ct. 834. In reaching that conclusion, the Court held that: (1) the term is the functional equivalant of the phrase "affecting commerce," which defines the current scope of Congress' commerce power; (2) the Act's legislative history suggested an expansive congressional intent; (3) the Court's precedent had described its reach as coinciding with that of the Commerce Clause; and (4) a broader interpretation is consistent with the purpose of the Act. *Id.*

Terminix supports our conclusion that the FAA does not apply to employment contracts. As mentioned above: (1) the phrase that Congress used in the employment exclusion of § 1 was, at enactment, the functional equivalent of excluding all employment contracts; (2) the legislative history shows that Congress did not intend for the FAA to apply to any employment contracts; (3) to the extent that precedent has addressed the issue, it has suggested that Congress did not intend for the FAA to apply to employment contracts; and (4) that interpretation is consistent with the original scope of the FAA, which excluded all employment contracts.

Other circuits have erred in applying *Terminix*, because they have ignored the "transaction" requirement in § 2 and, thus, have extended that section to the full reach of Congress' commerce power as understood in the post-1937 world. At the same time, they have reduced to extend the § 1 employment exclusion similarly, thereby creating a disharmony between the two provisions, a disharmony that did not exist when Congress enacted the FAA. *See* Epstein, 1 Green Bag 2d at 27-29 (so concluding).

II.

Based on the wording of § 2, the pre-New Deal scope of Congress' commerce power, the legislative history of the FAA, and the suggestions gleaned from *Lincoln Mills*, *Misco*, *Gilmer*, and *Terminix*, we hold that the FAA does not apply to labor or employment contracts. Thus, the FAA is inapplicable to the CBA that governs Craft's employment. Accordingly, we have no jurisdiction over Campbell Soup's interlocutory appeal and this appeal is hereby

DISMISSED.

BRUNETTI, Circuit Judge, Dissenting.

Today, the majority goes against the great weight of circuit court authority[1] by holding that exclusionary clause of § 1 of the Federal Arbitration Act ("FAA") applies to all contracts of employment within the scope of the Commerce Clause and that we therefore lack jurisdiction to hear this interlocutory appeal. Because I find that the plain language of statute dictates a contrary result, I respectfully dissent.

The majority avers that, when sections 1 and 2 of the FAA are read together, the term "engaged in interstate commerce" is ambiguous. To resolve this perceived ambiguity, it examines the historical context and legislative history of the FAA. From these extrinsic sources, the majority determines that Congress clearly intended to exclude all employment contracts from the ambit of the Act and that therefore the traditional rules of statutory interpretation are inapplicable because their use would frustrate obvious Congressional intent. In contrast to the majority's

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[1] As the majority concedes, almost every circuit to have considered this question directly has held that the employment exclusion clause of § 1 should be interpreted narrowly. *See* Majority Opinion, at n. 6.

approach to statutory interpretation, I believe that we have an obligation to first analyze the text and structure of the FAA before turning to extrinsic material. Only if these inquiries prove unhelpful in discerning Congressional intent should we engage in the majority's rather complex exercise in statutory interpretation. *See, e.g., Shannon v. United States*, 512 U.S. 573, 584, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *United States v. Taylor*, 487 U.S. 326, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988) (Scalia, J., concurring in part).

The plain language of the exclusionary clause states that the Act does not "apply to contracts of employment of seaman, railroad employees, or any other class of worker engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). A natural reading of this language indicates that Congress intended to exclude three specific types of employment contracts from the scope of the FAA. If one reads, as the majority does, the final phrase-"any other class of workers engaged in foreign or interstate commerce"-to exclude all contracts of employment then the specific pronouncements that seamen and railroad workers' employment contracts do not fall within the purview of the Act are drained of all meaning. *See Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("[i]t is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusionary clause of all significance") (internal citations omitted); *Cole v. Burns International Security Services*, 105 F.3d 1465, 1470-71 (D.C.Cir.1997).

The "cardinal principal of statutory construction" instructs that a court has a "duty to give effect, if possible, to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal citations omitted). Here, we can fulfill this duty by concluding that the phrase "workers engaged in interstate commerce" refers only to those workers who are themselves engaged in the movement of goods

in interstate commerce. Congress with ease could have drafted § 1 to read "nothing herein shall apply to contracts of employment." *Cole*, 105 F.3d at 1471. This, however, is not the language Congress enacted into law and I would decline to say that Congress included the words "seamen" and "railroad employees" for no purpose.

As the majority notes, the rule of ejusdem generis also suggests that § 1 should be interpreted narrowly. Application of this principle here indicates that the general reference to "any other class of workers engaged in foreign or interstate commerce" is most reasonably construed to include only workers who, like "seamen" and "railroad employees," are themselves engaged directly in the movement of goods in interstate commerce. *See Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 598 (6th Cir.1995) (quoting *Tenney Engineering Inc. v. United Electrical, Radio & Machine Workers of America, Local 437*, 207 F.2d 450, 452 (3d Cir.1953)).

Congress' phraseology in § 2, the primary substantive provision of the FAA, also supports a narrow interpretation of the employment exclusion clause. *See Asplundh Tree*, 71 F.3d at 601; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Cole*, 105 F.3d at 1471-72. Section 2 states that arbitration agreements in contracts "evidencing a transaction *involving commerce*" are enforceable in federal courts. 9 U.S.C. § 2 (1994). Section 1, by contrast, excludes employment contracts of "workers *engaged in . . . interstate commerce*." The fact that Congress used different phrases to define the scope of the FAA generally on the one hand and the transactions that are excluded from the Act on the other indicates that Congress did not intend these sections to have the same scope. While some commentators and the majority here suggest that the distinction between the phrases "involving commerce" and "engaged in commerce" was not recognized in 1925 when the FAA was enacted, the Supreme Court has indicated that the term "in commerce" when used in statutes

of this era should be interpreted narrowly. *See United States v. American Bldg. Maint. Industries*, 422 U.S. 271, 275-79, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). This textual argument is particularly persuasive here in light of the fact that when Congress reenacted the FAA in 1947 it was settled law that the phrase "engaged in commerce" was not coextensive with the limits of the power of Congress over interstate commerce. *See, e.g., FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881 (1941); *Kirschbaum v. Walling*, 316 U.S. 517, 522, 62 S.Ct. 1116, 86 L.Ed. 1638 (1942); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128-29, 63 S.Ct. 494, 87 L.Ed. 656 (1943).

By utilizing the traditional tools of statutory construction, the plain meaning of the exclusionary clause becomes clear: employment contracts for seamen, railroad workers, and other workers actually involved in the flow of commerce are excluded from the scope of the FAA. "The plain meaning of legislation should be conclusive, except in the rare case in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 243, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

The majority finds that this is one of the rare cases in which the traditional rules of statutory construction are inapplicable because their use would defeat the "obvious scope and purpose" of the exclusionary clause. The majority, however, does not find the indicia of congressional intent in either the text of structure of the Act. Rather, it divines from the historical context and legislative history that Congress clearly intended that the Act would apply only to commercial disputes and not to labor disputes. I disagree. Even assuming that the scant legislative history can be read to support such an interpretation, I agree with the D.C. Circuit that "[i] a case such as this, where the statutory

text does not admit of serious ambiguity, . . . legislative history is, at best, secondary and at worst irrelevant." *Cole*, 105 F.3d at 1472 (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-809 n. 3, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

For the foregoing reasons, I would find that, because Craft does not work in interstate commerce, this court has jurisdiction to hear this appeal under the FAA and would decide the case on the merits.

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No. 99-1379

IN THE
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

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INTEREST AND CONCERN OF THE *AMICUS*[1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by the Board of Governors after careful consideration of their qualifications by its membership Committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception have obtained general recognition through scholarly publication or other activi-

[1] Rule 37.6 statement: Counsel of record is the author of this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.

ties as an impartial authority in labor-management relationships. Members are prohibited from serving as advocates for either labor or management. Currently the Academy has 633 American and Canadian members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> "The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of social responsibility for advancing desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[2]

The Academy is the co-author and principal enforcer of an ethical code, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, that has been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. The proceedings of the annual meeting of the Academy are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials in the labor arbitration process.

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2 Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 18.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements (grievance arbitration) but also at times involving questions as to what the terms and conditions of new agreements should be (interest arbitration). Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination was not traditionally a function of labor arbitration. Recognizing that such arbitration has, however, become part of the American landscape the Academy has amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration, although it has continued to limit its membership to those accomplished in traditional grievance arbitration.

As a result of its study of the increasing use of arbitration agreements as a condition of employment the Board of Governors of the Academy adopted the following policy statement on May 21, 1997:

> The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.

The decision of the Ninth Circuit in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (1999) that the Ninth Circuit adopted and reaffirmed per curiam in this case (and in No. 99-1378, *Circuit City Stores, Inc. v. Ahmed*) will have a major impact on the enforceability of such agreements and a large impact on the number of statutory claims that arbitrators, including members of the Academy, will be called upon to decide. The interest of the Academy is, therefore, obvious.

Both the petitioner and the respondent in this case have consented to a filing of this amicus brief.[3] Their letters have been filed with the clerk.

ARGUMENT

1. The Court should grant the petition in this case (and as well in No. 99-1378, *Circuit City Stores, Inc. v. Ahmed*) limited to the first question presented identically, if somewhat inaccurately,[4] in both cases. In both cases the Ninth Circuit adopted and relied on its decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (1999). That decision clearly conflicts with the decisions of other circuits that have decided the meaning of the commerce requirement in the exemption of workers' contracts from the Federal Arbitration Act. It is an issue that this Court expressly reserved in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and it is important. Since the 1991 decision of this court in *Gilmer*, the practice of requiring employees to agree, as a condition of employment, to arbitrate rather than sue on claims of violation of federal and state anti-discrimination statutes has become common. Although the number of employees who are compelled to so agree is unknowable, estimates have been made that from 8 to 10% of the entire workforce of the United States is covered by such agreements.[5] They are

[3] Consent was also requested in No. 99-1378 and granted by the petitioner. No response, however, has been received from the respondent in that case.

[4] The first question presented states that the Ninth Circuit held "that the Federal Arbitration Act does not apply to contracts of employment." More precisely the Ninth Circuit held that the FAA does not apply because of the exemption in Section 1 of contracts of employment of "workers" engaged in an industry affecting commerce. The limitation to "workers" is significant. See *Bernhardt v. Polygraphic Co.*, 218 F.2d 948 (a "superintendant" is not within the exemption) (2d Cir. 1955), *reversed on other grounds*, 350 U.S. 198 (1956).

[5] See the surveys reported in Stone, *Employment Arbitration Under the Federal Arbitration Act* in Employment Dispute Resolution and Worker Rights 57 (IRRA, 1989).

enforceable under the Federal Arbitration Act in every circuit but the Ninth. Allowing this conflict to remain unresolved would create an intolerable situation for both the petitioner in these cases and other employers.

2. The second question presented in both of these cases, however, has no such broad significance and is not worthy of review. The issue is peculiar to the petitioner's particular form of agreement and is, indeed, different in the two cases, as the petitions acknowledge. Review of the Ninth Circuit's decision as to the scope of the exemption in Section 1 of the Federal Arbitration Act is important because of the widespread adoption and attempts to enforce workers' agreements to arbitrate their statutory claims. On the other hand, the question of whether in the particular circumstance of each of these two cases the agreement with the employer to arbitrate should be deemed to be part of a contract of employment is an unimportant question specific to the facts of these two cases and as to which there is no conflict in the circuits. Nor is there any conflict with the decision of this court in *Gilmer*. The registration with the New York Stock Exchange, which this Court there held not to be a contract of employment, was just that, not a contract with the employer.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, directly contrary to the holding of every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Circuit City Stores, Inc. v. Adams,* 194 F.3d 1070 (9th Cir. 1999), reprinted in the Joint Appendix ("J.A.") at pages 53 through 56. The Order of the United States District Court for the Northern District of California is unpublished, and reprinted in the Joint Appendix. J.A. at 43-52.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1999. The petition for a writ of certiorari was filed on February 16, 2000. The petition for a writ of certiorari was granted, limited to Question 1 presented by the petition, on May 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> *§ 1* "[C]ommerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> *§ 3* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

> *§ 4* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

9 U.S.C. §§ 1 - 4 (1994).

STATEMENT OF THE CASE

A. Factual Background.

In its 1991 landmark decision, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that a claim asserted by an employee against his employer under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, can be subjected to compulsory arbitration pursuant to an arbitration agreement. Relying on *Gilmer* and the Court's other rulings establishing a strong federal presumption of arbitrability under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 *et seq.*, employers throughout the country began to explore the advantages to employers and employees alike of entering into predispute agreements to arbitrate, rather than litigate, the claims or controversies that might arise between them. In designing their arbitration programs, responsible employers sought to draw the proper balance between the increased efficiencies of arbitration (which benefit both parties) and the requirement that arbitration programs allow

participants to vindicate effectively their statutory rights.

Circuit City is a national retailer of brand-name consumer electronics and related products. In March 1995, the company implemented an Associate Issue Resolution Program, consisting of an enhanced "open door" policy promoting increased communication between Circuit City employees and managers, as well as a program of final and binding arbitration of all employment-related legal disputes. Those individuals who were employed at the time the program was introduced in March of 1995 were given the opportunity to "opt-out" of the arbitration component of the program if they so desired. *See Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for certiorari filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000).

At all times subsequent to the March 1995 implementation of the program, individuals seeking employment with Circuit City have been presented, as part of the job application process, with the Circuit City Dispute Resolution Agreement ("DRA"). An individual who executes the DRA agrees to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, **exclusively** by final and binding **arbitration** before a neutral Arbitrator." (J.A. at 13) (emphasis in original). Only those individuals who have signed the DRA, agreeing to be bound by its terms, may have their application for employment considered by Circuit City. (J.A. at 12.) A prospective applicant who executes the DRA but then changes his mind within three days may withdraw from the agreement to arbitrate by notifying Circuit City that he is withdrawing his application for employment. (J.A. at 14.)

The DRA provides that "neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of

employment between Circuit City and me." (J.A. at 13.)[1] The obligation to arbitrate exists independently of the employment relationship and applies before, during and after the employment relationship. (J.A. at 13.) The DRA is a separate, stand-alone agreement between the prospective applicant and Circuit City, entered into as part of the application process.

Saint Clair Adams ("Adams" or "Respondent") entered into an agreement with Circuit City to arbitrate any and all employment-related legal claims on October 23, 1995, when he executed the DRA and submitted it with his application for employment. (J.A. at 12-13.) Circuit City agreed to be bound by the DRA, as reflected by the signature of a Senior Vice President of the company. (J.A. at 14.) Adams did not withdraw his consent to the DRA. (J.A. at 11.) In November 1995, Adams was hired by Circuit City as a sales counselor in Circuit City's Santa Rosa store, selling merchandise in the store's "home/office" department. (Ninth Circuit Excerpts of Record ("E.R.") at 4-13; J.A. at 40.) Adams was employed by Circuit City in that capacity until he resigned his employment on November 30, 1996.

B. Proceedings Below.

On November 26, 1997, Adams sued Circuit City in a California Superior Court for a variety of employment-related legal claims. (E.R. at 4-13.) On December 5, 1997, Adams also sought arbitration, submitting to Circuit City an Arbitration Request Form that described the dispute he wished to have decided by an arbitrator in the same terms as the causes of action contained in his lawsuit. (J.A. at 40.) The Arbitration Request Form confirmed, post-dispute, Adams' agreement to resolve this dispute by arbitration.

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[1] The Dispute Resolution Rules and Procedures contain the rules and procedures governing the parties' agreement to arbitrate. (J.A. at 19-28.)

(J.A. at 40.) ("I hereby submit the above-described suit for arbitration. I agree to accept the decision and award of the Arbitrator as final and binding as to all claims related to my employment relationship with Circuit City. . ."). He subsequently filed an amended complaint in his lawsuit on January 21, 1998, incorporating a request for declaratory relief with respect to his rights and obligations pursuant to the DRA.[2] (E.R. at 14.)

Pursuant to §§ 3 and 4 of the FAA and 28 U.S.C. § 1332, Circuit City filed a Petition to Stay State Court Action and to Compel Arbitration in the United States District Court for the Northern District of California ("Petition") (Ninth Circuit Supplemental Excerpts of Record 1-30.) On May 1, 1998, the District Court granted the Petition and entered an Order Staying State Court Action and Compelling Arbitration. (J.A. at 43-52.) Adams appealed the District Court's Order to the United States Court of Appeals for the Ninth Circuit. (E.R. at 100.)

The Ninth Circuit found that the FAA was inapplicable to this case. To reach this conclusion, the Court first restated its decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), in which the Court held, contrary to every other federal Court of Appeals, that the exclusion found in § 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign and interstate commerce," 9 U.S.C. § 1, must be read to exclude from the coverage of the FAA all contracts of employment. *See Adams*, 194 F.3d at 1071-72, *citing Craft*, 177 F.3d at 1094).

The Ninth Circuit then concluded that because the DRA was a condition precedent to Adams' employment, the DRA

[2] Specifically, Adams sought a court order that the DRA, which he acknowledged signing, was not enforceable against him on various legal grounds. Notably, he did not challenge the applicability of the FAA to the agreement.

was an employment contract. The Court reached this conclusion notwithstanding the specific disclaimer in the DRA to the contrary. *Adams*, 194 F.3d at 1071. Having concluded that the DRA was an employment contract, and in reliance upon the *Craft* holding that the FAA is inapplicable to all employment contracts, the Ninth Circuit reversed the district court's order compelling arbitration and remanded the case for dismissal because of a lack of federal authority. *Id.* at 1072. Circuit City filed a timely petition for a writ of certiorari, seeking review of two issues. *See* Pet. i. On May 22, 2000, this Court granted Circuit City's petition, limited to the first question presented.[3]

SUMMARY OF ARGUMENT

The Federal Arbitration Act was originally enacted in 1925, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by the American courts, and to place arbitration agreements upon the same footing as other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Its provisions manifest a liberal federal policy favoring

[3] In the second part of its petition for certiorari, Circuit City renewed its argument that because respondent's arbitration agreement was executed as part of the employment application process, it is not a "contract[] of employment" within the meaning of § 1 of the FAA. Though this Court's grant of certiorari was limited to the first question presented, Circuit City has not waived this point. As emphasized in the brief amicus curiae filed by the Society for Human Resource Management, the Ninth Circuit's view that virtually any agreement between an employer and employee is covered by § 1 would render the FAA inapplicable to arbitration provisions in a whole host of ancillary agreements between employers and employees, such as stock option and non-compete agreements, which unquestionably are not employment contracts.

arbitration agreements. *Id.*

Section 1 of the FAA provides that "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Beginning nearly a half century ago, with *Tenney Engineering, Inc. v. United Electrical and Machine Workers of America*, 207 F.2d 450 (3rd Cir. 1953) (en banc), eleven federal Courts of Appeals construed § 1's exclusion narrowly, finding it applicable only to contracts of employment of those workers who are actually engaged in the movement of goods in interstate commerce. In *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), however, the United States Court of Appeals for the Ninth Circuit interpreted this language in § 1 of the FAA broadly, as excluding from the FAA's provisions all labor or employment contracts. In the case now before this Court, the Ninth Circuit reaffirmed and expanded the holding in *Craft*. The Ninth Circuit concluded that an agreement to arbitrate disputes, executed as a condition precedent to employment, was an employment contract, and that the FAA was therefore inapplicable.

In *Craft*, the Ninth Circuit failed to apply the well-established canon of statutory construction that courts should avoid a reading of statutory language which renders some words altogether redundant, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995), and the rule of *ejusdem generis*. The former is applicable because, as one Court of Appeals noted, "[I]t is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance. A broad exclusion of all employment contracts could simply have said 'nothing herein shall apply to contracts of employment." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-71 (1997) (Edwards, C.J.) (citations omitted). The latter canon provides that in the construction of a statute containing a list of items, general terms which follow specific terms should

be limited to matters which are similar to those specified. *Gooch v. United States*, 297 U.S. 124, 128 (1936). Thus, in § 1, where "any other class of workers engaged in foreign or interstate commerce" follows "seamen [and] railroad employees," the exclusion provided by the latter phrase is applicable to only those classes of workers who are engaged in foreign or interstate commerce "in the same way that seamen and railroad workers are." *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995).

The Ninth Circuit explained its holding by reference to the intentions of Congress at the time that the FAA "was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930's." *Craft*, 177 F.3d at 1086. However, the Ninth Circuit's recitation of legislative history was selective and incomplete. *See Asplundh Tree* at 596-601. Furthermore, the Ninth Circuit disregarded subsequent indicia of congressional intent: the reenactment of the FAA in 1947; the presumption that employers and employees may enter into arbitration agreements implicit in the congressional encouragement of alternative means of dispute resolution (including arbitration) provided in the Civil Rights Act of 1991; and the failure of numerous efforts in Congress since *Gilmer* to amend various employment discrimination statutes so as to prohibit the enforcement of arbitration agreements as to claims arising thereunder.

The narrow construction of FAA § 1, advanced by petitioner and adopted by all of the other Courts of Appeals, is consistent with the liberal federal policy favoring arbitration. That interpretation of the FAA by the other Courts of Appeals was acknowledged, although not addressed, by this Court in *Gilmer*, 500 U.S. at 25 n. 2. The courts and Congress have relied upon that uniform construction of the statute, as has petitioner. As demonstrated through the views expressed by numerous amici in support of petitioner's position, the nation's

business community similarly has relied upon this construction of § 1, and thus the applicability of the FAA to agreements to arbitrate employment disputes throughout the country.

The petitioner, Circuit City, respectfully asks that this Court reverse the ruling of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. THE FAA § 1 EXCLUSION REACHES ONLY SEAMEN, RAILROAD EMPLOYEES, AND OTHER WORKERS ALSO DIRECTLY ENGAGED IN THE INTERSTATE TRANSPORTATION OF GOODS IN COMMERCE.

By enacting the FAA, Congress codified a strong federal public policy favoring arbitration of disputes. *See* 9 U.S.C. §§ 1-16) (1994). Section 1 of the FAA contains a statutory exclusion which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Ninth Circuit held in *Craft*, and again in this case, that this language excludes from the coverage of the Act all contracts of employment – that it reads, in effect, "Nothing herein shall apply to contracts of employment." That reading, however, cannot be squared with the statutory text.

The Ninth Circuit in *Craft* relies heavily upon § 2 of the FAA, which sets out the Act's affirmative coverage by making enforceable any written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. This Court has construed § 2's commerce language broadly to reach to the limits of Congress' Commerce Clause authority. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). In *Craft* and, by implication, in this case, the Ninth Circuit held that the reference to commerce in § 2's coverage provision should be

read as coextensive with the reference to commerce in § 1's exclusion of employment contracts. Accepting that premise, the logical conclusion would be that the § 1 exclusion also must reach to the limits of the Commerce Clause and hence to all employment contracts. *See Craft*, 177 F.3d at 1087-88, 1091-93.

That conclusion fails, however, because it is based on a faulty premise. The term "commerce" must be understood by its context. This Court's prior decisions establish that the words modifying the term "commerce" within a statute are critical to understanding its meaning. When a federal statute refers to people and/or things *engaged in* commerce, the statute refers to something less than all people and/or things *involving* commerce. Thus, the proper question for decision here is which subcategory of employment contracts Congress intended to exclude from the FAA when it excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce." The answer lies in the statutory language itself: the subcategory excluded is the employment contracts of all workers who are "engaged in commerce" in the same way that seamen and railroad employees are, i.e., those workers directly engaged in the interstate transportation of goods. Every other federal Court of Appeals correctly has reached this same conclusion.[4]

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[4] *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of [FAA] Section 1."); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels

A. The Term "Engaged in Commerce" As Used In § 1 Is Narrower Than The Term "Involving Commerce" As Used In § 2.

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of commerce itself."), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers. . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA § 1 exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA excludes from the FAA only the employment contracts of workers engaged in the transportation of goods in commerce."). The Federal Circuit, because of its specialized and limited jurisdiction, has had no occasion to address this issue.

1. Just last Term, this Court reaffirmed the fundamental proposition that in a federal statute regulating interstate commerce, any words modifying the term "commerce" are critical to interpreting the precise scope of the statute. *See Jones v. United States*, 120 S. Ct. 1904, 1909 (2000). At issue in *Jones* was a federal arson statute covering property "*used in* interstate or foreign commerce or in any activity *affecting* interstate or foreign commerce." 18 U.S.C. § 844(i) (Supp. IV 1998) (emphasis added). Focusing on the latter phrase "affecting . . . commerce," the government argued that the statute reached all property subject to federal regulation under the Commerce Clause.[5] This Court disagreed. Section 844(i), it explained, includes not only the broad phrase "affecting commerce," but also the "qualifying words 'used in' a commerce-affecting activity." 120 S. Ct. at 1909. "The key word is 'used,'" the Court concluded, and that word invokes something less than full Commerce Clause authority. *Id.* Instead, the phrase "*used in* . . any activity affecting interstate . . . commerce", 18 U.S.C. § 844(i) (emphasis added), is "most sensibly read to mean active employment for commercial purposes," rather than the more passive or indirect connection to commerce that might suffice to trigger broader Commerce Clause authority. 120 S. Ct. at 1910.

The same analysis applies to § 1 of the FAA. As in the federal arson statute, the word "commerce" does not stand alone and "unqualified." *Id.* at 1909. Instead, § 1 and § 2 of the FAA each uses a different modifier. Section 1 excludes only employment contracts of workers "*engaged in* interstate

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[5] Congress' most "far reaching" authority under the Commerce Clause is its power to regulate "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-60 (1995). Accordingly, the statutory term "affecting commerce," standing alone, normally signals an assertion of maximum Commerce Clause authority. *See Jones*, 120 S. Ct. at 1909.

commerce," while § 2 includes within the coverage of the FAA all transactions "*involving* commerce." This "broad inclusion/narrow exclusion" approach is completely consistent with the "liberal federal policy favoring arbitration agreements" advanced by the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 469 U.S. 1, 24 (1983).

In contrast to § 2's broad modifier, the § 1 qualifier "*engaged in* commerce," like the arson statute phrase "*used in* commerce," is ordinarily understood to signify some active and direct involvement in the conduct of interstate commerce. In common usage, a worker is "engaged in interstate commerce" when he is actively employed in the actual conduct of interstate commerce, and not simply when his job might have some attenuated or passive connection to interstate commerce. *Cf. United States v. American Bldg. Maint. Indus.*, 422 U.S. 271 (1975) (provider of janitorial services not "engaged in commerce" under § 7 of Clayton Act).

2. The phrase "engaged in commerce" means something less than the full set of activities subject to Commerce Clause regulation. The language of the FAA and this Court's own precedents compel such a conclusion. In construing the FAA itself, this Court in *Allied-Bruce* already has held that the § 2 term "involving commerce" is broader than "engaged in commerce," the phrase that appears in § 1. In construing § 2's language to reach to the fullest extent of Congress' Commerce Clause authority and hence to all activities substantially affecting commerce, 513 U.S. at 273-77, the Court expressly distinguished "*involving* commerce," as used in § 2, from "*in* commerce," the language of § 1. "These words ['involving commerce'] are broader than the often found words of art 'in commerce.' They therefore cover more than 'only persons or activities *within the flow* of interstate commerce.'" *Id.* at 273 (quoting *American Building*, 422 U.S. at 276) (emphasis in original). The Ninth Circuit's premise in *Craft* – that the references to

"commerce" have the same scope in the exclusionary and coverage provisions of the FAA – cannot be reconciled with this reading of the statutory text. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471-72 (D.C. Cir. 1997) (Edwards, C.J.) (construing § 1 narrowly in light of *Allied-Bruce*).

Allied-Bruce is only the most recent in a long line of this Court's cases construing the terms of art "in commerce" and "engaged in commerce" to invoke something less than full Commerce Clause authority. Indeed, many of these cases specifically contrast the phrase "engaged in commerce" with phrases of broader regulatory sweep such as "affecting commerce." *See, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974) (construing "engaged in commerce" under Clayton and Robinson-Patman Acts) ("in commerce" standard "differs distinctly" from jurisdictional provisions "keyed directly to effects on interstate markets," and is not satisfied "merely by showing that . . . activities affect commerce"); *American Building*, 422 U.S. at 276 (Clayton Act) ("contention that 'in commerce' should be read as if it meant 'affecting interstate commerce' [has been] emphatically rejected") (citing *FTC v. Bunte Bros.*, 312 U.S. 349 (1941)); *Russell v. United States*, 471 U.S. 858, 859 n.4 (1985) (federal arson statute) (recognizing "distinction between legislation limited to activities 'in commerce' and an assertion of . . . full Commerce Clause power so as to cover all activity substantially affecting interstate commerce"); *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943) (Fair Labor Standards Act) ("We have held that this clause ['engaged in commerce'] covered every employee in the 'channels of commerce' . . . as distiniguished from those who merely affected that commerce.") (quoting *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943)).[6]

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[6] As the Court has noted, *see McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980), Congress itself is fully aware that the terms "in commerce" and "engaged in commerce," unlike "affecting commerce," are not coextensive

The FAA § 2 coverage phrase "involving commerce" is the functional equivalent of "affecting commerce" and that phrase extends the reach of the FAA to the limits of Congress' Commerce Clause power. *Allied-Bruce*, 513 U.S. at 273-74. As this Court's cases make clear, the § 1 exclusion of employment contracts for workers "engaged in commerce" must exclude a class of contracts well short of the overall sweep of the statute as defined by the broader language of § 2.[7]

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with its Commerce Clause authority. When Congress wants to invoke its full Commerce Clause authority, it does not limit itself to language like "engaged in commerce," but instead couples it with broader language to signal its broad intent. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1994) (applicable to employees "engaged in commerce" *and* to employees engaged "in the production of goods for commerce"); Antitrust Procedural Improvements Act, 15 U.S.C. § 18 (1994) (applicable to persons "engaged in commerce" *or* "any activity affecting commerce"); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(a) (1994) (covering investment in any entity "engaged in" commerce *and* any enterprise the "activities of which affect" commerce); National Labor Relations Act, 29 U.S.C. § 158 (1994) (covering individuals employed by any person "engaged in commerce" *or* "in an industry affecting commerce"); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79a (1994) (applicable to companies "engaged in interstate commerce" *and* to companies engaged "in activities which directly affect or burden interstate commerce").

[7]This Court has identified three distinct categories of activity that Congress may regulate under its commerce power. *United States v. Lopez*, 514 U.S 549 (1995). "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect . . . persons or things in interstate commerce. . . . Finally, Congress' commerce authority includes the power to regulate those activities . . . that substantially affect interstate commerce." 514 U.S. at 558-59 (citations omitted). This third category is broader than the first two, reflecting Congress' most far reaching authority. *Id.* at 560.

3. Despite this authority, the Ninth Circuit believes that the phrase "engaged in commerce" in § 1 nevertheless should be read as broadly as Congress' Commerce Clause power, in part because the FAA was enacted, in the court's view, before the phrase became a narrower term of art. *See Craft*, 177 F.3d at 1093. This Court, however, repeatedly has construed the phrase as narrower than the full sweep of Congress's commerce power regardless of when the relevant statute was enacted -- including, notably, the Court's prior construction of the FAA itself in *Allied-Bruce*. *Supra* at 14.

Similarly, in *American Building*, the Court flatly rejected the government's argument that the term "engaged in commerce" used in § 7 of the Clayton Act, enacted in 1914, "should be interpreted to mean engaged in any activity that is subject to the constitutional power of Congress over interstate commerce." 422 U.S. at 277. In *Gulf Oil*, the Court also addressed and rejected the argument that the phrase "engaged in commerce," as it appears in both the Clayton Act of 1914 and the Robinson-Patman Act of 1936, "manifest[s] the full degree of [Congress's] commerce power." 419 U.S. at 199.

These cases demonstrate that the Ninth Circuit's premise is wrong. Even by the time the FAA was enacted in 1925, repeated decisions of this Court already had construed virtually identical statutory language to invoke less than the

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As *Lopez* makes clear, "affecting commerce" and "in commerce" do not have the same meaning for constitutional purposes, and they trigger different constitutional inquiries. *See id.* at 559-60 (inquiry into "substantiality" of effects applies only in cases involving intrastate activity affecting interstate commerce). As "in commerce" is narrower than "affecting commerce" for purposes of constitutional analysis, application of the same principle to construction of the relevant language of the FAA would support the contention that the "engaged in . . . commerce" language of FAA § 1's exclusion is narrower than the "involving commerce" language of FAA § 2's coverage provision.

full range of Congress' commerce power. These cases arose under the Federal Employers' Liability Act of 1908 ("FELA"), which at the time applied to railroad companies "engaging in [interstate] commerce," and made such companies liable to employees injured while "employed . . . in such commerce." 35 Stat. 65 (now codified at 45 U.S.C. §§ 51-60 (1994)). The Court held in 1914 that this language did not extend to the full range of Congress' Commerce Clause authority (even in the more narrow way that authority was understood at the time). *See Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 477-78 (1914). Instead, the Court held in a series of subsequent cases interpreting the FELA, the statutory language encompassed only the more limited category of workers "engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Shanks v. Del., Lackawanna, & W. R.R. Co.*, 239 U.S. 556, 558 (1916); *see B&O S.W. R.R. v. Burtch*, 263 U.S. 540, 543-44 (1924) (applying *Shanks* rule); *S. Pac. Co. v. Indus. Accident Comm'n*, 251 U.S. 259, 263 (1920) (same).[8] Presumably, when using the phrase "engaged in commerce" in § 1 of the FAA, Congress was fully aware of these earlier decisions construing FELA's very similar language to identify only a specific subcategory of workers falling within Congress' Commerce Clause authority. *See Tenney*, 207 F.2d at 453 ("In incorporating almost exactly the same phraseology [as the FELA] into the Arbitration Act of 1925

[8] In 1939, Congress decided that the FELA should sweep more broadly and amended the statute so that it applies not only to workers "employed in commerce" but also to any worker "any part of whose duties . . . shall be the furtherance of interstate or foreign commerce; or [who] in any way directly or closely and substantially, affect[s] such commerce." Act of Aug. 11, 1939, 53 Stat. 1404 (codified at 45 U.S.C. § 51 (1994)). The amendment expanding the statute's reach is itself another example of Congress' recognition that the term "in commerce" does not itself reach to the full extent of the Commerce Clause. *See supra* at Section I.A.2.

its draftsmen and the Congress which enacted it must have had in mind this current construction of the language which they used.").

In summary, contrary to the Ninth Circuit's view, § 1's exclusion of employment contracts for workers "engaged in commerce" is not coextensive with § 2's inclusion of all contracts "affecting commerce" within the coverage of the FAA. The Ninth Circuit, while acknowledging that Congress used two different phrases to modify the term "commerce" in §§ 1 and 2 of the FAA, nevertheless concluded that Congress intended their meanings to be the same. However, if that were true, then any text beyond "all contracts of employment" is surplusage.[9] Section 1 must be interpreted more narrowly in order to give meaning to all of its terms. The question here is not whether § 1 excludes only a subcategory of employment contracts from the reach of the FAA, but which subcategory the statute excludes.

B. The Phrase "Engaged in Commerce" As Used In FAA § 1 Means Engaged In The Interstate Transportation of Goods.

By its terms, the set of employment contracts excluded by § 1 are only those of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The precise scope of the last category – contracts of "workers engaged in . . . interstate commerce" – may be readily determined by reference to the language and structure of the statute itself. The reference to contracts of workers "engaged in . . . interstate commerce" does not stand alone. It follows immediately upon the identification of two other specific types of employment contracts excluded from

[9] Elsewhere, however, the Ninth Circuit cites with approval *Babbit v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995), recognizing as appropriate a reluctance to treat statutory terms as surplusage. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1193 n.13 (9th Cir.), *cert. denied*, 119 S. Ct. 445 (1998).

the statute: contracts of seamen and contracts of railroad employees. The most sensible reading of the final category is as a reference to the employment contracts of other classes of workers who are engaged in interstate commerce "*in the same way that seamen and railroad workers are.*" *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (emphasis added).

1. The rule of *ejusdem generis* provides that in construing a statute, the meaning of general terms that follow specific ones should be limited to "matters similar to those specified." *Gooch v. United States*, 297 U.S. 124, 128 (1936); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). In *Alloyd*, the Court applied a related canon of construction in interpreting § 2(10) of the Securities Act of 1933, 15 U.S.C. § 77b(10) (1994).[10] That provision defines "prospectus" as any "notice, circular, advertisement, letter, or communication, written or by radio or television" offering a security for sale. The respondent argued that a "prospectus" was, under the terms of § 2(10), any written "communication," including a private contract. This Court disagreed. The term "communication" as used in § 2(10) of

[10] The Court in *Alloyd* relied for this part of its analysis on the rule of *noscitur a sociis*, providing that "a word is known by the company it keeps." 513 U.S. at 575. Lower courts considering the § 1 exclusion generally have referred to the closely related canon of *ejusdem generis* in undertaking the same analysis. In either event, the substance of the analysis is the same. *See* Antonin Scalia, *A Matter of Interpretation: Federal Courts and The Law* 26 (1997). ("[*N*]*oscitur a sociis*[] means, literally, 'it is known by its companions.' . . . Another canon – perhaps representing only a more specific application of the last one – is *ejusdem generis*, which means 'of the same sort.' It stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using 'tacks, staples, screws, nails, rivets, and other things,' the general term 'other things' surely refers to other fasteners.").

the Securities Act, the Court emphasized, was "but one word in a list," and it could not be understood apart from that context. 513 U.S. at 574. Instead, the word "communication" took its meaning from the items that preceded it: "notice, circular, advertisement, [and] letter." Because those terms referred to documents of wide or public dissemination, the Court concluded, the term "communication" should also be understood to mean only "public communication," and hence to exclude Alloyd's private sales agreement. *Id.* at 575.

The same analysis applies to FAA § 1. Like the term "communication" in the Securities Act, "workers engaged in interstate or foreign commerce" is one part of a list. The phrase takes its meaning from the more specific examples that precede it: seamen and railroad employees. Seamen and railroad employees are alike in that they are both classes of workers "*actually engaged in the movement* of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." *Tenney*, 207 F.2d at 452-53 (emphasis added); *see also Asplundh Tree*, 71 F.3d at 598; *Cole*, 105 F.3d at 1471. Taking a cue from the specific mention of those two classes of workers, the remaining general category surely refers to those "other workers" who also are actually engaged in the movement of goods in interstate commerce.

2. This interpretation coheres not only with settled rules of statutory construction but also with the legal context in which the FAA was enacted. As noted above, the FELA statute at the time the FAA was enacted applied to railroads "engaged in commerce" and railroad workers "employed in such commerce." This Court had held well before 1925 that, even though Congress permissibly could regulate a broader range of employees, FELA's specific language reached only those railroad workers directly involved in the interstate transportation function of the railroad. *See Shanks*, 239 U.S. at 558; *supra* at 18-19. Thus, had Congress limited the

FAA's § 1 exclusion solely to "railroad employees engaged in interstate commerce," it almost certainly would have been understood as applying to only those railroad employees engaged in actual transportation functions, as the Court held in *Shanks* and its progeny. The fact that seamen and other workers "engaged in interstate commerce" also were inserted into the exclusion should not alter the analysis. What "seamen" plainly have in common with "railroad employees" is that they, too, are engaged in actual transportation functions. If the remaining class of "other workers engaged in interstate commerce" is defined consistently with the "seamen" and "railroad employees" specifically identified in the statute, then such "other workers" also must be engaged in the actual interstate transportation of goods in commerce.

3. The Ninth Circuit in *Craft* offers only one answer to the argument that FAA § 1 is limited to transportation workers: § 1 must be interpreted to be coextensive with § 2, which means that § 1 includes *all* workers of any kind that Congress could reach under the Commerce Clause. That is no answer at all. As demonstrated above, no reasonable dispute can exist that the § 1 "engaged in commerce" language covers less than the § 2 "involving commerce" language. In this particular context, the phrase "engaged in commerce" is used to refer to workers actually involved in the interstate transportation of goods. The analysis in *Craft* suggests no theory whatsoever for how the class of workers engaged in commerce might be defined if, as the case law instructs, it must be something less than all workers.

While the phrase "workers engaged in interstate . . . commerce" can be given meaning from its statutory context, the Ninth Circuit's interpretation would ignore the context altogether and simply excise the words "seamen" and "railroad employees" from FAA § 1. By its reading, the final phrase of § 1's exclusionary clause – "any other class of workers engaged in interstate . . . commerce" –

necessarily includes those specific workers along with every other worker under the reach of Congress' Commerce Clause authority. This approach ignores the well-established rule that a court, in construing any statute, should "avoid a reading which renders some words altogether redundant." *Alloyd*, 513 U.S. at 574.

If Congress had intended to exclude the employment contracts of all workers, or even all workers "engaged in interstate or foreign commerce," it could have drafted such a statute "with ease," *id.* at 575, and without the purposeless addition of "seamen" and "railroad employees." As the Fifth Circuit explained in *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (1996), "[i]t is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance." *See also Cole*, 105 F.3d at 1470; *Craft*, 177 F.3d at 1094 (Brunetti, J., dissenting); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 359 (7th Cir. 1997) (Posner, C.J.); *Asplundh Tree*, 71 F.3d at 600; *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997). The only way to give meaning to all three terms in § 1 – seamen, railroad employees, and other workers engaged in interstate commerce – is by reference to what all three have in common, i.e., direct involvement in the interstate transportation of goods.[11]

4. Respondent does not even arguably fall within this transportation worker exclusion. Respondent worked as a salesperson in a Circuit City store. He did not directly transport any goods in interstate commerce. Nor did he have

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[11] The terms "seamen" and "railroad employees" are not, of course, rendered superfluous by understanding the phrase "workers engaged in foreign or interstate commerce" to reach those workers engaged in transportation of goods in interstate commerce. As explained above, *supra* at Section I.B.1, the specific terms remain significant because, under the rule of *ejusdem generis*, they give content to the general term which follows.

any involvement, even indirect, in the transportation of goods in interstate commerce. Respondent would not be covered under any court's narrow reading of the § 1 exclusion, and neither Respondent nor the Ninth Circuit ever has suggested otherwise. Instead, Respondent can fall within the § 1 exclusion only if, as the Ninth Circuit held, § 1 excludes all employment contracts. Yet, as shown above, that all-encompassing reading cannot be reconciled with the statutory text.

A narrow reading of § 1, limiting the exclusion to workers actually involved in the movement of goods in interstate commerce, is now the rule in eleven of the federal circuits. In many of those circuits, this rule has governed for years. *See infra* at Section II.B. In none of those circuits has this reading of § 1's exclusion given rise to especially difficult or even noteworthy problems in application. *See Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 958 & n.14 (D. Md. 1994) ("The bulk of the decided cases which discuss the reach of § 1 relate to workers who were clearly not involved in a transportation industry.") (citing cases); *see also, e.g., Cole*, 105 F.3d at 1470 (parties agree that security guard does not fall within narrow understanding of § 1 exclusion); *American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987) (parties do not "seriously argue" with the proposition that postal workers in question fall within narrow understanding of § 1 exclusion).

C. The Legislative History of FAA § 1 Reveals No Clearly Expressed Legislative Intent Contrary to the Plain Meaning of the Statutory Text.

When the statutory text is clear, as in the FAA, resort to legislative history is unnecessary. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989); *see also Cole*, 105 F.3d at 1472 ("In a case such as [§ 1], where the statutory text does not admit of serious ambiguity . . .

legislative history is, at best, secondary, and, at worst, irrelevant").

In any event, a straightforward textual reading of the FAA does not lead to a result inconsistent with some "clearly expressed legislative intent." *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal quotations omitted). On the point at issue here – the scope of the § 1 exclusion – the legislative history is at best inconclusive, supporting the narrow, textual reading of the exclusion at least as strongly as Respondent's broad alternative.[12]

1. The legislative history with respect to § 1's exclusionary clause is scant and somewhat murky. The bill that became the FAA was drafted by the American Bar Association's Committee on Commerce, Trade and Commercial Law of the American Bar Association ("ABA Committee") and sponsored by the Association before Congress. *Tenney*, 207 F.2d at 452 & n.5; *Craft*, 177 F.3d at 1089 n.10. The original draft of the bill did not contain the exclusion that later became a part of § 1, *Craft*, 177 F.3d at 1089, and very little official discussion of the origin of the exclusion exists. The best indication of the impetus for the exclusion, as the Third Circuit explained in *Tenney*, appears in a report of the ABA Committee:

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[12] Several circuit courts have concluded that the sparse legislative history, on balance, reinforces the text of § 1 and supports a narrow reading of the exclusion, limited to workers directly engaged in transport of goods in interstate commerce. *See Signal-Stat Corp. v. United Elec., Radio & Mach. Workers*, 235 F.2d 298, 302 (2d Cir. 1956); *Tenney*, 207 F.2d at 452-53 (3d Cir.); *Asplundh Tree*, 71 F.3d at 601 (6th Cir.); *Pryner*, 109 F.3d at 358 (7th Cir.). Only the Ninth Circuit has taken the opposite position. This pattern of lower court precedent would be unlikely if the legislative history "clearly expressed" an intention that § 1 be read broadly. As emphasized in the brief amicus curiae filed by the Employers Group, the legislative history does not justify an expansive interpretation of the contract-of-employment exclusion.

> Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

207 F.2d at 452 (quoting 48 Am. Bar Assn. Rep. 287 (1923)).

The meager legislative history, then, "indicates that the exclusionary clause was added to overcome the objection of the seamen's union," and not for any broader purpose. *Asplundh Tree*, 71 F.3d at 601. The legislative history is not especially helpful, however, in explaining the expansion of the exclusionary clause to reach railroad workers and other transportation workers as well. Several courts have concluded that "presented with the problem of exempting seamen's contracts," *Tenney*, 207 F.2d at 452, Congress most likely noted that federal legislation already provided for arbitration of seamen's grievances and governed employment relations in the railroad industry, so that additional coverage by the FAA would be redundant and possibly confusing. *Id.*; *Asplundh Tree*, 71 F.3d at 598 (quoting *Tenney*); *Pryner*, 109 F.3d at 358; *Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Employees of Am. v. Pa. Greyhound Lines, Inc.*, 192 F.2d 310, 313 (3d Cir. 1951).[13] Conjecture abounds. The Third Circuit speculated

[13] *See* Shipping Commissioners Act of 1872, Ch. 322, 17 Stat. 262 (providing for arbitration by "Shipping Commissioners" of disputes between seamen and employers); Newlands Act, Ch. 6, 38 Stat. 103 *et seq.* (1913) (providing for mediation of disputes between railroad employees and employers); Transportation Act of 1920, Ch. 91, 41 Stat. 469 *et seq.* (establishing "Adjustment Boards" to handle grievances and disputes over working conditions in railroad industry).

that Congress then "rounded out" the exclusionary clause to cover similar transportation workers. *Tenney*, 207 F.2d at 452-53. Chief Judge Posner surmised in *Pryner* that Congress anticipated that other transportation workers, most immediately motor carriers, also would unionize and lobby successfully for protective legislation. 109 F.3d at 358. Just as likely, these additional groups of transportation workers were included simply to avoid any appearance of favoritism for selected "special interests."

The legislative history of the FAA establishes none of this conclusively. It does show, however, that § 1's employment contract exclusion was a response to a specific objection from the seamen's union about seamen's employment contracts, rather than to any broader concern. This fact by itself suggests a narrow scope for § 1. The rest is an entirely plausible account of Congress' intent, readily reconcilable with what legislative history there is and, more important, is fully consistent with the statutory text.

2. The Ninth Circuit in *Craft* offers no more enlightened or enlightening account of the legislative history for its unlikely reading of the § 1 exclusion.[14] Instead, the Ninth Circuit focuses on § 2 of the FAA and concludes that Congress never intended to bring employment disputes under the Act's coverage provision at all. The phrase "transaction involving commerce" as used in the coverage provision, according to the Ninth Circuit, "connot[es]" only "commercial deal[s] and merchant's sale[s]." 177 F.3d at 1085; *see also id.* at 1089-90 (quoting statement of ABA Committee Chair W.H.H. Piatt that FAA not intended to reach "labor disputes").

[14] The Ninth Circuit's historical analysis on this point is more fully critiqued in the amicus curiae brief of the Employers Group.

The other federal circuits have, of course, reached a different conclusion. *See, e.g., Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (creation of employment relationship is commercial "transaction" falling within terms of § 2); *Asplundh Tree*, 71 F.3d at 601 (Piatt reference to "labor disputes . . . would tend to support the contention that the Act was not intended to apply to collective bargaining agreements, but sheds no further light on the issue of individual employment contracts").

More important, this Court reached a different conclusion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Perry v. Thomas*, 482 U.S. 483 (1987). In *Gilmer*, the Court held that an employee's claim that his employer had discharged him in violation of the Age Discrimination in Employment Act could be subjected to compulsory arbitration under the FAA. *Id.*, 500 U.S. at 24-35. Though *Gilmer* did not involve a "contract of employment" within the meaning of § 1 of the FAA, *id.* at 25 n.2 (arbitration agreement in securities registration application, rather than contract with employer), it most certainly involved an employment dispute, deemed by the Court to be subject to the provisions of the FAA. Likewise, the Court held in *Perry* that an employee's claim against his employer for unpaid commissions was subject to arbitration under § 2 of the FAA, despite state law providing to the contrary. After *Gilmer* and *Perry*, the Ninth Circuit position in *Craft* – that the Act was intended "solely to bind merchants who were involved in commercial dealings," and not to reach employment disputes at all, 177 F.3d at 1089 – is simply untenable.

3. The Ninth Circuit in *Craft* also suggests that the § 1 exclusion was intended by Congress to reach to the outer limits of its Commerce Clause authority. The Ninth Circuit reasons that, in 1925, Congress believed that its Commerce Clause power was limited to "employees who actually transported people or goods in interstate commerce." *Id.* at

1087. Thus, it concludes, Congress intended the § 1 exclusion, like the § 2 coverage provision, to be coextensive with the Commerce Clause power. *Id.*

The problem with this argument is three-fold: it cannot be reconciled with the statutory language, it ignores the dynamic nature of the Commerce Clause power, and nothing in the legislative history supports it. Instead, the legislative history provides indications to the contrary. The House Judiciary Committee favorably reported the FAA in 1924 with the understanding that Congress' Commerce Clause authority was not limited to "employees who actually transported people or goods in interstate commerce," *cf. Craft*, 177 F.3d at 1087, but instead extended to all "contracts relating to interstate commerce." *See* H. R. Rep. No. 96, at 1 (1924) ("the [federal] control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce") (cited in *Allied-Bruce*, 513 U.S. at 271, for intended breadth of Act).

The House Judiciary Committee probably had in mind at least Congress' power to regulate, along with "the transportation of property," the "purchase, sale and exchange of commodities" in interstate commerce. This power was well-established in 1925 and conceded even by the Ninth Circuit elsewhere in its *Craft* opinion. *See Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (quoted in *Craft*, 177 F.3d at 1086); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921). Along with Congress' power over interstate sales came power over the employees engaged in such sales. By 1912, Congress' Commerce Clause authority was understood to extend "incidentally to every instrument and agent by which such commerce is carried on," including the employees who were "agents" of such commerce. *See In re Second Employers' Liab. Cases*, 223 U.S. 1, 47-48 (1912). The Committee also could have been relying on early indications that Congress' Commerce Clause authority might

extend even to purely *intrastate* transactions with substantial effects on interstate commerce. *See Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914) (Congress may regulate intrastate rail rates); *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 477 (1914) (Congress may regulate railroad employee injuries sustained during purely intrastate work).

Regardless, the Congress that enacted the FAA in 1925 apparently did not believe that its authority was limited to workers directly involved in the transportation of goods in interstate commerce. Moreover, the Congress that reenacted the FAA in 1947 certainly understood its authority more broadly.[15] To the extent the legislative history illuminates this point at all, it contradicts the premise of the Ninth Circuit's argument.

Finally, this Court already has held that it will not simply assume, as the Ninth Circuit did, that the pre-New Deal Congress which enacted the FAA meant the term "engaged in commerce" to reach as far as congressional power under the Commerce Clause. *See American Building*, 422 U.S. at

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[15] *Jones & Laughlin Steel* [in 1937], *Darby* [in 1941], and *Wickard* [in 1942] ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

Lopez, 514 U.S. at 556. Logically then, statutes construed by reference to the Commerce Clause necessarily must demonstrate the same elasticity and are not susceptible to an interpretation that fixes their meaning at the time of their enactment.

277-83; *Gulf Oil*, 419 U.S. at 199-201; *see also supra* at Section I.A.3. The Court is particularly skeptical of such arguments when, as in this case, courts of appeals consistently have construed "engaged in commerce" according to its ordinary and more limited meaning, and Congress has declined to clarify the matter. In *Gulf Oil*, the Court held that four decades of near-uniform appellate law reading "engaged in commerce" as different than "affecting commerce," combined with continued congressional silence, left it with no justification for extending the text of the Robinson-Patman Act beyond its "clear language." 419 U.S. at 200-01. The same is true here. Starting with *Tenney*, 207 F.2d 450 (3d Cir. 1953), the courts of appeals have with almost perfect consistency construed the § 1 exclusion narrowly, *see supra* at 11-12 n.4, without eliciting any response from Congress. *See infra* at 41. Only the clearest of legislative history could justify the conclusion that § 1 actually was intended to reach as far as the Commerce Clause – and, as discussed above, no legislative history, clear or otherwise, supports that argument.

II. THE NARROW READING OF THE FAA § 1 EXCLUSION ADOPTED BY NEARLY EVERY COURT OF APPEALS EFFECTUATES THE UNDERLYING PURPOSE OF THE FAA.

The foregoing arguments in favor of a narrow construction of the FAA § 1 exclusion are compelling standing alone. In conjunction with these arguments, however, this Court also should consider the significant practical and policy reasons supporting such a reading.

A. A Narrow Construction Of The FAA § 1 Exclusion Furthers the Liberal Federal Policy Favoring Arbitration.

In an unbroken string of decisions, this Court has recognized that by enacting the FAA, Congress articulated a liberal public policy favoring arbitration. In *Moses H. Cone*,

this Court defined that public policy as follows:

> [The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

460 U.S. at 24-25.

The following year in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court again recognized that "[i]n enacting [the FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements." *Id.* at 10. From the legislative history of the FAA, this Court gleaned a "congressional intent to place '[an] arbitration agreement . . . upon the same footing as other contracts, where it belongs.'" *Id.* at 15-16 (quoting H.R. Rep. No. 96, at 1 (1924)).

Three years later, this Court applied these precepts in support of its holding that the FAA preempted a California statute providing that wage collection actions between employers and employees may be maintained without regard to the existence of private agreements to arbitrate. *Perry v. Thomas*, 482 U.S. 483, 489 (1987). The Court construed the FAA as follows:

> Section Two . . . embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as

> exist in law or in equity for the revocation of any contract."

Id. at 489 (quoting *Keating*, 465 U.S. at 11). Moreover, this Court noted that general application of the FAA obviously was intended by Congress to be coextensive with the broad scope of the Commerce Clause:

> [The FAA is a] statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause. Its general applicability reflects that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered. . . ."

Id. at 490 (citations omitted).

As this Court repeatedly has recognized, the "basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate. The origins of those refusals apparently lie in ancient times, when the English courts fought for extension of jurisdiction – all of them being opposed to anything that would all together deprive every one of them of jurisdiction." *Allied-Bruce*, 513 U.S. at 270 (citations and internal quotation marks omitted)

This federal policy in favor of arbitration properly guides the Court's resolution of interpretive questions that arise under the FAA. In *Allied-Bruce*, the Court held that § 2 of the FAA reaches to the limits of Congress' Commerce Clause authority in part because "a broad interpretation of [§ 2's] language is consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms." 513 U.S. at 275. Likewise, in *Gilmer*, 500 U.S. at 26, the Court established at the outset that its inquiry into whether Congress had precluded arbitration of ADEA claims would be informed by the default presumption that "questions of arbitrability must be addressed with a healthy regard for the federal policy

favoring arbitration."

Section 1 of the FAA should be construed with this same "healthy regard" for the statute's underlying purpose. By reading the FAA § 1 exclusion narrowly – in accord with the statutory language and context – this Court would promote a broad application of the FAA. That approach is consistent with the liberal public policy in favor of arbitration articulated by Congress in the statute and recognized in this Court's prior decisions.

Conversely, the broad reading of the FAA § 1 exclusion, adopted by the Ninth Circuit alone, would remove from the scope of the FAA virtually all arbitration agreements between employers and employees, dramatically narrowing the effective scope of the statute. As a result, the enforceability of arbitration agreements between employers and employees may vary widely based on conflicting and inconsistent state law. An employer operating in several states and utilizing uniform procedures and a standardized arbitration agreement with its employees nationwide may find that the agreement is enforceable in some states but not in others and for same claims but not for others.[16] This anomalous result would be directly contrary to the spirit of the FAA through which Congress has evinced a desire for consistent and rigorous enforcement of arbitration agreements. *See Perry*, 482 U.S. at 490; *Allied-Bruce*, 513 U.S. at 270-71.[17]

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[16] For a discussion of the variation in state laws and the ensuing bifurcation of claims, see the brief amicus curiae of the Council for Employment Law Equity.

[17] The Ninth Circuit itself, in a case outside the employment context, recently acknowledged concern over a "patchwork in which the FAA will mean one thing in one state and something else in another." *Portland Gen. Elec. Co. v. United States Bank Trust Nat'l Ass'n.*, 2000 U.S. App. LEXIS 16498 at *19 (9th Cir. July 17, 2000) (all three judges on panel joined in concurrence stating that "the court ought to rethink the patchwork created"). At issue in *Portland* was a prior Ninth Circuit holding that courts must look to state law to define terms contained in, but not defined by, the FAA. In practice, depending upon which state's law applies, that analysis has dictated inconsistent results even when construing similar agreements under the same federal statute. The approach adopted in *Craft* would create a comparable patchwork with respect to the enforceability of arbitration agreements under state law in the employment context.

B. Application Of The FAA To Arbitration Agreements Between Employers And Employees Is Consistent With The Public Policy Favoring Arbitration Of Disputes.

1. This Court already has made clear that the broad pro-arbitration public policy articulated in the FAA fully applies to the arbitration of statutory claims between employers and employees. In *Gilmer*, this Court expressly found that employees could be required, as a condition of employment, to agree to mandatory pre-dispute arbitration of statutory discrimination claims. Although expressly declining to address the specific issue presented here (*i.e.*, the proper scope of the FAA § 1 exclusion), this Court nonetheless rejected Gilmer's arguments that arbitration of employment disputes was inherently unsatisfactory as a means of advancing the public policy behind federal anti-discrimination statutes:

> Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

The Court also rejected the argument that enforcement of agreements requiring arbitration of employment-related legal disputes somehow is "unfair" to employees, or favors employers. Rather, the Court recognized that arbitration offers all parties significant advantages over litigation:

> Although [discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce*, 513 U.S. at 280 (non-employment case; "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . .") (quoting H.R. Rep. No. 97-542, at 13 (1982)).

In *Perry*, this Court took the same approach, applying the FAA to require arbitration of disputes between employers and employees. Specifically, the Court in *Perry* permitted an employer to compel arbitration pursuant to the FAA of an employee's claims for breach of contract, conversion, civil conspiracy to commit conversion, and breach of fiduciary duty, all related to a claim for non-payment of sales commissions. *Perry*, 482 U.S. at 484-85.

Circuit City acknowledges that both *Gilmer* and *Perry* arose in a context where the arbitration agreement was contained in the securities industry registration application,

rather than in a contract of employment. However, nothing in the majority holding of either case suggests that disputes between employees and employers properly should not be subject to the federal public policy favoring arbitration. To the contrary, both cases clearly demonstrate that arbitration of such disputes is appropriate. If this Court adopts the broad reading of the FAA § 1 exclusion advanced by the Ninth Circuit, *Perry* and *Gilmer*, and specifically the analysis in *Gilmer* of arbitration of statutory employment claims, would be of little enduring practical import to arbitration agreements between employers and employees.

The suggestion that the *Gilmer* holding is limited to situations in which the agreement to arbitrate is contained in a contract between the employee and some third party (such as a securities exchange) simply cannot be reconciled with the text and spirit of the FAA. Indeed, such a holding might result in a proliferation of industry associations, or other third party entities, through which employers could require that employees execute arbitration agreements which would then be enforceable pursuant to the FAA. Such an artifice – prohibiting employers and employees from entering into FAA-enforceable arbitration agreements directly, but permitting them to do so through straw men – makes no practical sense and cannot have been envisioned by Congress in enacting the FAA.

2. Nor could such a result be reconciled with fifty years of contrary jurisprudence. In 1953, the Third Circuit first meaningfully analyzed the scope of the FAA § 1 exclusion. *See Tenney*, 207 F.2d at 450. After considering the text of the FAA as well as its legislative history, the Third Circuit found that Congress intended to limit the FAA § 1 exclusion to "the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers." *Id.* at 452-53. Following *Tenney*, every United States Court of Appeals to rule on the

subject (except the Ninth Circuit) has agreed with this analysis, permitting enforcement via the FAA of employer-employee arbitration agreements outside the transportation industries.

Since 1991, the circuit courts have been able to rely not only on *Tenney* and its progeny for this rule, but also on this Court's own decision in *Gilmer*. As Chief Judge Edwards explained in *Cole*:

> [A]lthough the decision in *Gilmer* did not reach the issue of section 1's scope . . . the majority opinion indicates that the Court would be inclined to read section 1 narrowly, as we do today . . . . As Justice Stevens's dissent suggests, *see Gilmer*, 500 U.S. at 40, if the FAA actually excluded all employment contracts from the enforcement provisions of the FAA, it would be anomalous to compel arbitration of Gilmer's employment claims simply because the arbitration agreement was not formally a part of a "contract for employment." We believe that the result reached in *Gilmer* implicitly suggests that the FAA does not exclude all contracts of employment.

105 F.3d at 1472. Reliance on *Gilmer* is particularly apt in this case. Respondent's arbitration agreement, like *Gilmer*'s, was not part of a formal "contract for employment." *See supra* at 4-5 & n.3. If that was enough to take Gilmer's agreement outside § 1 and bring it within the scope of the FAA, it should be enough here, as well.

In reliance on this case law, as well as the liberal federal policy favoring arbitration articulated in the FAA, employers and employees have for years entered into arbitration agreements between them structuring their affairs in accordance with what are reasonably perceived to be settled understandings. These agreements repeatedly have proven workable. As recognized by Justice O'Connor in her concurring opinion in *Allied-Bruce*, such widespread reliance

is important when considering issues of statutory interpretation, and has been given special emphasis when construing the FAA:

> [M]ore than ten years have passed since *Southland [Corp. v. Keating*, 465 U.S. 1 (1984)], several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation of the [FAA] in the interim. After reflection, I am persuaded by considerations of *stare decisis*, which we have said "have special force in the area of statutory interpretation, to acquiesce in today's judgment. . . . *Southland* has not proved unworkable . . . ."

513 U.S. at 283-84. Important also is the recognition by Justice O'Connor that if Congress disagrees with this Court's interpretation of the FAA, Congress surely may address the issue through statutory amendment. *Id.* at 234 ("[A]s always, 'Congress remains free to alter what we have done.'" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989))).[18]

Congress, the courts, federal agencies, and private organizations alike have recognized the advantages of using alternative dispute resolution to resolve employment controversies. The federal court system is overwhelmed by the number of employment-related lawsuits on the docket.[19] As a result, the administrative process and judicial proceedings for resolution of employment claims have

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[18] Congress took precisely such action when, in response to various decisions by this Court, including *Patterson*, it enacted the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a (1994).

[19] Stuart H. Bompey, et. al, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21 (1997) (the number of employment-related civil rights suits shot up 128% from 1991 to 1996).

become inefficient, time-consuming and costly.[20] Numerous employers in the public and private sectors have recognized these problems and have sought some means of alternative dispute resolution to lessen the burdens associated with the legal redress system.[21] Congress has endorsed the use of arbitration, among several types of alternative dispute resolution, and many federal agencies have taken initiatives in this area. Thus, Congress and the federal government recognize the advantage of using alternative dispute resolution, rather than the courthouse, to resolve workplace disputes.

Congress' approval of arbitration of employment disputes has been manifested in many ways. Two recently enacted federal nondiscrimination statutes specifically encourage the use of alternative dispute resolution to resolve employment disputes. The Americans with Disabilities Act ("ADA"), for example, encourages the use of alternative dispute resolution "where appropriate and to the extent authorized by law." 42 U.S.C. § 12212 (1994). Similarly, the Civil Rights Act of 1991, which amended the ADA and Title VII of the Civil Rights Act of 1964, provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials and arbitration, is encouraged to resolve

[20] *See Rosenberg v. Merrill Lynch*, 170 F.3d 1, 7-8 n. 4 (1st Cir. 1999) ("Arbitration may be far less costly than litigation and resolve disputes more quickly. Indeed, the number of employment-related cases in the courts has increased dramatically in the past two decades." (citations omitted)).

[21] For discussion of employment arbitration programs in various companies throughout the country, see the briefs by amici American Arbitration Association, Council for Employment Law Equity and Credit Suisse First Boston.

> disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, 105 Stat. 1081. Given these amendments, Congress has demonstrated that it bears no hostility to the arbitration of workplace disputes.

Even more compelling, Congress is presumed to be aware of this Court's invitation to correct by legislation any perceived judicial missteps in statutory construction.[22] *See Allied-Bruce*, 513 U.S. at 284 ("As always, 'Congress is free to alter what we have done.'"). It is also forewarned of the inferences this Court will draw from its failure to do so. *See Gulf Oil*, 419 U.S. at 200-01 (characterizing Congressional silence as approval of near-uniform appellate interpretation of the Robinson-Patman Act.). Bills have been introduced in every Congress since *Gilmer* to reverse that case's outcome and prohibit employers from compelling the arbitration of certain federal discrimination claims. *See* S. 121, 106th Congress (1999); S. 63, H.R. 983, 105th Congress (1997); S. 366, H.R. 3748, 104th Congress (1995); S. 2405, 103d Congress (1994). Yet not one of these bills ever has been reported out of committee.

Thus, broad agreement exists, and history proves, that arbitration of employer-employee disputes is enforceable, and valuable, as an alternative to litigation. Circuit City developed its DRA in reliance upon the strong and clear legislative and judicial public policy in favor of arbitration, as described by the Supreme Court in *Gilmer*, 500 U.S. at 25 (reaffirming the "liberal federal policy favoring arbitration agreements"). Circuit City has maintained its DRA in reliance upon the body of precedent recognizing the federal policy favoring the effective and efficient resolution of disputes through arbitration. A narrow reading of the FAA § 1 exclusion respects the statutory text and will continue to

[22] Indeed, Congress has accepted that invitation repeatedly. *See supra* at n.8 (FELA) and n.18 (Title VII).

effectuate that policy.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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(5)

No. 99-1379

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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CHRONOLOGICAL LIST OF DOCKET ENTRIES

I. U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (Case No. 98-CV-365)

1/30/98	PETITION by Petitioner Circuit City Stores, Inc. to stay state court action and to compel arbitration, with MEMORANDUM of points and authorities in support thereof, (No Summons Issued), Fee status paid entered on 1/30/98 in the amount of $150.00 (receipt #:45864) [3:98-cv-00365] (tn)
1/30/98	DECLARATION of Pamela G. Parsons on behalf of Petitioner Circuit City Stores, Inc. in support of its petition [1-1] [3:98-cv-003651 (tn)
1/30/98	RECEIVED [Proposed] Order staying state court action and compelling arbitration (Petitioner Circuit City Stores, Inc.) [3 :98-cv-00365] (tn)
1/30/98	ORDER RE COURT PROCEDURE and SCHEDULE by Judge Charles A. Legge: Proof of service to be filed by 3/16/98; counsels' case management statement to be filed by 5/26/98; and initial case management conference will be held at 11:00 a.m. on 6/5/98 (cc: all counsel) (tn)
2/4/98	NOTICE of hearing by Petitioner on its petition to stay state court action and to compel arbitration on 3/6/98 at 9:30 a.m. [3:98-cv-00365] (tn) [Entry date 02/06/98]
2/4/98	Docket Modification (Administrative) hearing will be held on 3/6/98 at 9:30 a.m. on petition to stay state court action and to compel arbitration [3:98-cv-00365] (tn) [Entry date 02/06/98]

2/5/98 PROOF OF SERVICE by Petitioner of petition to stay state court action and to cannel arbitration [0-0], motion notice [4-1], case management schedule order [3-1], declaration [2-1] , order received [0-0] , petition [1-1] [3 :98-cv-00365] (tn) [Entry date 02/10/98]

2/10/98 CLERK'S NOTICE Re-setting hearing on plaintiff's petition to stay state court action and to compel arbitration to 3/13/98 at 9:30 a.m. [3:98-cv-00365] (tn) [Entry date 02/11/98]

2/10/98 NOTICE by Petitioner of pendency of other action or proceeding [3:98-cv-003'05] (tn) [Entry date 02/11/98]

2/20/98 MEMORANDUM of points and authorities by respondent/defendant in opposition plaintiff/petitioner's petition/motion [1-1] [3:98-cv-00365] (tn) [Entry date 02/26/98]

2/25/98 NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before judge Charles A. Legge by Petitioner for rule 11 sanctions with Notice set for 9:30 a.m. on 4/3/98 [3:98-cv-00365] (tn) [Entry date 02/26/98]

2/25/98 DECLARATION of Rex Darrell on behalf of Petitioner in support of its motion for rule 11 sanctions [9-1] [3:98-cv-00365] (tn) [Entry date 02/26/98]

2/25/98 RECEIVED [Proposed] Order granting Petitioner's motion for rule 11 sanctions [9-1] [3:98-cv-00365] (tn) [Entry date 02/26/98]

2/27//98 REPLY MEMORANDUM by Petitioner to opposition and in support of petition to stay state court action and to compel arbitration [3:98-cv-00365] (tn) [Entry date 03/03/98]

3/2/98 PROOF OF SERVICE by Petitioner of motion reply [11-1] [3:98-cv-00365] (tn) [Entry date 03/03/98]

3/5/98 RECEIVED [Proposed] Stipulation and Order to continue hearing date of motion (defendant) [3:98-cv-00365] (tn) [Entry date 03/10/98]

3/10/98 STIPULATION and ORDER by Judge Charles A. Legge re-setting hearing on petition [1-1] at 9:30 a.m. on 4/3/98 (cc: all counsel) [3:98-cv-00365] (tn) [Entry date 03/12/98]

3/13/98 MEMORANDUM of points by defendant in opposition to plaintiff's motion for rule 11 sanctions [9-1] [3:98-cv-00365] (tn) [Entry date 03/18/98]

3/13/98 DECLARATION of Angela M. Alioto on behalf of defendant in support of its opposition memorandum [14-1] [3:98-cv-00365] (tn) [Entry date 03/18/98]

3/20/98 REPLY MEMORANDUM by Petitioner to opposition and in support of its motion for rule 11 sanctions [9-1] [3:98-cv-00365] (tn) [Entry date 03/23/98]

4/3/98 MINUTES: (C/R JoAnn Bryve) (Hearing Date: 4/3/98) granting plaintiff's motion to stay state court proceeding & to compel arbitration; denying plaintiff's motion for rule 11 sanctions [9-1]; petitioner to prepare order [3:98-cv-00365] (tn) [Entry date 04/07/98]

4/15/98 REPORTER'S TRANSCRIPT; Date of proceedings: 4/3/98 (C/R: JoAnn Bryce) [3:98-cv-00365] (tn) [Entry date 04/16/98]

4/29/98 OPINION AND ORDER: by Judge Charles A. Legge granting petitioner's petition to stay State Court action and to compel arbitration [1-1]; denying petitioner's motion for rule 11 sanctions [9-1], and terminating case; appeal filing ddl 6/1/98 (Entered: 5/1/98) (cc: all counsel) [3:98-cv-00365] (tn) [Entry date 05/01/98]

II. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (Case No. 98-1 5992)

6/2/98 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): YES. Setting schedule as follows: CADS is past due; CADS must be filed no later than 6/9/98; appellant's designation of RT is due 6/8/98; appellee's designation of RT is due 6/17/98; appellant shall order trancript by 6/29/98; court reporter shall file transcript in DC by 7/28/98; certificate of record shall be filed by 8/4/98; appellant's opening brief is due 9/14/98; appellees' brief is due 10/13/98; appellants' reply brief is due 10/27/98; [98-15992] (sm)

6/8/98 Filed order MOATT (KG) A review of the record suggests that this court may lack jurisdiction over the appeal because the order being appealed Is not an appealable, (CITE) Within 14 days after entry of this order, aplt shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. If aplt elects to show cause, aple may respond within 10 days after serv of aplt's memorandum. If aplt does not comply with this order, the clk shall dismiss this appeal pursuant to 42-1. Briefing is suspended pending further order of the court. [98-15992] (dg)

6/22/98 Filed Appellant's response to order of 6/8/98, [3465850-1] ; served on 6/22/98 (MOATT) [98-15992] (dg)

6/29/98 Filed order CONFATT (em) The Court of Appeals' records do not indicate that spit has tiled a CADS In accordance with Cir R 3-4. This may be a result of an oversight by counsel or a mistake in processing by the DC or this court. Within 1 4 days of the filing date of this order, aplt shall file a CADS, contact the clerk and assist location of the docketing statement if one is already filed, or dismiss the appeal voluntarily. If aplt has already filed the CADS or files it in response to this order, aplt is requested to serve a copy along with any attachments, on the Circuit Mediation Office in SF. [98-15992] (dg)

7/9/98 Filed Civil Appeals Docketing Statement served on 7/8/98 to CONFATT [98-15992] [98-15992]

7/10/98 Filed order (Appellate Commissioner: PLS) The court has received appellant's response to this court's 06/08/98 order to show cause. The court discharges the order to show cause. Appellant shall designate the reporter's transcript by 07/1/98, The transcript is due 08/17/98. Appellant's opening brief and excerpts of record are due 09/28/98; appellee's brief is due 10/28/98; the optional reply brief is due within 14 days after service of appellee's brief. Received [98-15992] (sm)

7/17/98 Received Appellant notice of designation of reporter's transcript. (no further RTs will be ordered) [98-15992] (dg)

8/14/98 Filed order CONFATT (BLS) Case referred to Confatt for assessment conference only. Conference to be on 9/15/98 at 11:00 a.m. PT, by telephone (y/n): yes. The briefing schedule remains in effect. . [98-1599 (dg)

9/18/98 Filed order CONFATT (CLB) The briefing schedule previously set by the court is amended as follows: appellants' brief, excerpts of record are due 10/13/98; appellees brief due 11/20/98; the reply brief is due 14 days from date of serv of aple's brief. We court has determined that this appeal will not be selected for Inclusion in the Mediation Program. All further inquiries regarding this appeal, including requests for ext of time, should be directed to the clerk's office. [98-15992](dg)

10/13/98 Filed original and 5 copies Appellant Saint Clair Adams opening brief (Informal: no) 40 pages and five excerpts of record in 1 volumes; served on 11/3/98 [98-1599 (dg)

11/23/98 Filed original and 15 copies appellee Circuit City Stores' 55 pages brief, 5 Supp. Exc. in 1 vol.; served on 11/19/98 [98-15992] (crw)

7/13/99 Calendar check performed [98-15992] (mw)

7/27/99 Calendar materials being prepared. [98-1692] [98-15992] (aw)

8/3/99 CALENDARED: Pasadena Oct 4, 1999 9:00 a.m. Courtroom 3 [98-159923 (th)

8/3/99 Filed Circuit City Stores additional citations, served on 7/30/99 (fax/pnl) [98-15992] (ot)

9/10/99 Filled order (Deputy Clerk: ah) The parties are ordered to file suppl brfs on or before 9/24/99, and should not exceed 10 pages on the following issues: The parties are further ordered to provide a courtesy copy of the suppl brfs to the clerks office in Pasadena. FAXED TO CSL AT 2:15 P.M.) [98-15992] (gall)

9/24/99 Filed Circuit City Stores additional citations, served on 9/23/99 (PANEL by express) [98-15992] (dg)

9/24/99 Filed original and 15 copies appellee Circuit City Stores supplemental brief of 10 pages, served on 9/23/99 (PANEL. by fax) [98-15992] (dg)

9/24/99 Filed original and IS copies Appellant Saint Clair Adams supplemental brief of 8 pages, served on 9/24/99 [98-15992] (dg)

10/4/99 ARGUED AND SUBMITTED TO Betty B. FLETCHER, Dorothy W. NELSON, Melvin BRUNETTI 98-15992] (rmv)

11/18/99 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Betty B. FLETCHER; Dorothy W; NELSON, author; Melvin BRUNETTI.) FILED AND ENTERED JUDGMENT. [98-15992] (dg)

12/10/99 MANDATE ISSUED [98-15992] (jjf)

12/15/99 Filed Circuit City Stores motion to recall the mandate, served on 12/14/99 [3810825] (PANEL by express mail, too voluminous to fax) (dg)

1/19/00 Filed Circuit City Stores additional citations, served on 11/8/00 (in sup ort of motion to recall mandate) (PANEL by fax) [98-15992] (dg)

2/23/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1379 filed on 2/16/00. [98-1592] (gail)
3/2/00	Received Rex Darrell Berry for Appellee Circuit City Stores letter dated 03/01/00 re: Circuit City Stores, Inc. filed a writ of certiorari. Appelle is requesting that pending motion to recall the mandate be granted (AUTHORING JUDGE) [98-15992] (sm)
3/9/00	Filed order (Betty B. FLETCHER, Dorothy W. NELSON, Melvin BRUNETTI): The mtn of aple Circuit City to stay or recall the mdt is granted. The mdt issued 12/20/99 is recalled. The issuance of the mdt shall be stayed until the Supreme Court's final decision in 99-1379. [913-15992] (crw)
5/25/00	Received notice from Supreme Court, petition for certiorari GRANTED on 5/22/00 limited to Question 1 presented by the petition. Supreme Court No. 99-1379 (dg)

REX DARRELL BERRY, ESQ. (CSB#110219)
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Seattle, WA 98101
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Attorneys for Petitioner
CIRCUIT CITY STORES, INC.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIRCUIT CITY STORES, INC., a Virginia corporation,	CASE NO. C 98-0365
Petitioner/Plaintiff,	DECLARATION OF PAMELA G. PARSONS IN SUPPORT OF PETITION TO STAY STATE COURT ACTION AND TO COMPEL ARBITRATION
vs.	
SAINT CLAIR ADAMS, a California resident,	
Respondent/Defendant.	

I, Pamela G. Parsons, do hereby declare as follows:

1. I currently am employed by Circuit City Stores, Inc. ("Circuit City") in the position of Associate General Counsel. I am a member of management with authority over circuit City's Arbitration Program. I have personal knowledge of the facts stated herein.

2. Circuit City is, and at all material times was, a Virginia corporation with its principal place of business in Richmond, Virginia. Circuit City is a corporate citizen of Virginia, and is authorized to do business within the State of California.

3. On November 26, 1997, Saint Clair Adams filed a civil action against Circuit City and three individual defendants employed by Circuit City, in the Superior Court of the State of California for Sonoma County, Superior Court Case No. S-CV-217898 ("the original underlying lawsuit"). The original underlying lawsuit was served on Circuit City on January 2, 1998. Mr. Adams served a First Amended Complaint ("the amended underlying lawsuit") on Circuit City effective January 26, 1998.

4. On or about October 23, 1995, as a part of his application process with Circuit City, Saint Clair Adams, like all applicants, entered into the Circuit City Dispute Resolution Agreement, by which he agreed to arbitrate any and all employment-related legal disputes with Circuit City. Attached hereto as Exhibit A is a true and correct copy of the Dispute Resolution Agreement executed by Mr. Adams on October 23, 1995. Circuit City records identify December 1, 1995 as Mr. Adams' actual date of hire. Attached hereto as Exhibit B is a true and correct copy of a Circuit City internal document entitled "New Hire Maintenance Screen" identifying Mr. Adams' date of hire as December 1, 1995.

5. As part of the job application process, prospective applicants are provided with a copy of Circuit City's Dispute Resolution Rules and Procedures, a true and correct copy of the document which would have been given to Mr. Adams is attached hereto as Exhibit C. Saint Clair Adams acknowledged receipt of same when he executed the Dispute Resolution Agreement.

6. Prospective applicants have a choice whether to enter into the Dispute Resolution Agreement. Applicants who initially choose to participate are advised in writing by the

Dispute Resolution Agreement that they have three days within which to withdraw their consent and application for employment to avoid being bound by the Dispute Resolution Agreement. Saint Clair Adams did not withdraw his consent to binding arbitration, or application within the three-day period.

7. Circuit City does not consider an application for employment unless the Dispute Resolution Agreement is signed. By executing the Dispute Resolution Agreement, Saint Clair Adams agreed to be bound by the same Dispute Resolution Rules and Procedures as are all associates who applied for work with Circuit City after March 1995.

8. On December 9, 1997, Circuit City received from Saint Clair Adams an Arbitration Request Form and cashier's check for $75.00. Attached hereto as Exhibit D are true and correct copies of those documents. On the Arbitration Request Form, Mr. Adams identifies his own date of hire by Circuit City as "November 3, 1995." Id. Circuit City responded to Mr. Adams' Request for Arbitration by submitting an Arbitration response Form in a timely manner. A true and correct copy of the Circuit City Arbitration Response Form is attached hereto as Exhibit E.

9. Circuit City refers to all applicants, current and former employees as "Associates."

10. This Declaration is made by me voluntarily. I have been promised no benefit, nor threatened with any reprisal in connection with this Declaration.

I declare under penalty of perjury under the laws of the Commonwealth of Virginia that the foregoing is true and correct.

Date: January 28, 1998 /S/ Pamela G. Parsons
Pamela G. Parsons

Place: Richmond Virginia

EMPLOYMENT APPLICATION

(Confidential)

CIRCUIT CITY STORES, INC. IS AN EQUAL OPPORTUNITY EMPLOYER BY BOTH POLICY AND PRACTICE AND COMPLIES WITH ALL FEDERAL AND STATE LAWS WHICH FORBID DISCRIMINATION.

IT IS UNLAWFUL IN MASSACHUSETTS TO REQUIRE OR ADMINISTER A LIE DETECTOR TEST AS A CONDITION OF EMPLOYMENT OR CONTINUED EMPLOYMENT. AN EMPLOYER WHO VIOLATES THIS LAW SHALL BE SUBJECT TO CRIMINAL PENALTIES AND CIVIL LIABILITY.

NAME (LAST, FIRST, MIDDLE INITIAL): ABAJI, ST. CLAIR

SOCIAL SECURITY NUMBER: 547-45-8663

STREET: PO Box 816

CITY: Wilbraham STATE: MA ZIP CODE: 01095

HOME PHONE: (707) 575-4648

WORK PHONE: (707) 575-4648

Thank you for considering Circuit City as an employer. To ensure that we make a hiring decision that is right for us and you, we use a number of different selection tools and consider a great amount of information before a decision is made. As you go through the employee selection process, you may come in contact with some or all of the following selection tools.

1. Employment Application — Complete all sections which pertain to you. Do not include a resume as a substitute for incomplete information. Sign and date the application. The employment application allows Circuit City to determine your qualifications and experience. By signing the application, you authorize Circuit City to verify the information contained in the application. Falsification of information on the application or failure to provide accurate information can result in disqualification for employment or termination of employment if discovered after hire.

2. Dispute Resolution Agreement — This agreement requires you to arbitrate any legal dispute related to your application for employment or employment with Circuit City. Circuit City will not consider your application unless this agreement is signed.

3. Employment Interviews — Several personal (or telephone) interviews may be conducted with you in order to provide more detailed information regarding your background and qualifications.

4. Employment Eligibility Verification — This form is required by the U.S. Department of Justice and the Immigration and Naturalization service. It is used to verify your identity and right to work in the United States.

5. Employment Testing — Various tests may be administered to measure your aptitude and abilities in job related areas. While most tests are short, some administered to management level candidates may take several hours.

6. Test for Evidence of Substance Abuse — This is a urinalysis test for abusive levels of any chemical substance.

7. Reference Checks — Former employers and educational references are verified prior to an offer of employment.

8. Records Checks — Verification and information checks with the Social Security Administration, criminal courts, state and county repositories of criminal records, Department of Motor Vehicles, and credit bureaus.

9. Physical Examination — Some positions in the Company require the applicant to take a physical examination .

10. Loss Prevention Interview — During this interview, you will be asked questions concerning your employment application, any current and past involvement with illegal drugs, any prior felony convictions, any adverse information from prior employers, and other related matters.

Exhibit A Page 1 of 6

Form # P1160 / Rev. 1/95

BEST AVAILABLE COPY

If you wish to be considered for employment you must read and sign the following agreement. You will not be considered as an applicant until you have signed the Agreement. With this application you should have received the *Rules and Procedures of the Agreement*. You should familiarize yourself with these rules and procedures prior to signing the Agreement. If you did not receive the Rules and Procedures you must request a copy from a Circuit City representative prior to signing the Agreement. You will note that if you sign at this time you do have three (3) days to withdraw your consent. You may, of course, take the package with you and return with it signed, if you wish to continue your application process.

CIRCUIT CITY DISPUTE RESOLUTION AGREEMENT

I recognize that differences possibly may arise between Circuit City Stores, Inc. and me during my application or employment with Circuit City (Circuit City Stores, Inc. includes affiliate companies such as CarMax, Patapsco Designs and FNANB). I recognize that it is in the interest of both Circuit City and me that all disputes be resolved in a manner that is fair, private, expeditious, economical, final and less burdensome or adversarial than court litigation. Circuit City has an effective Open Door Policy, and I will try to take advantage of it where feasible. I understand, however, that not all issues can be resolved using the Open Door Policy.

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, **exclusively** by final and binding **arbitration** before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort.

I understand that if I do file a lawsuit regarding a dispute arising out of or relating to my application or candidacy for employment, employment or cessation of employment, Circuit City may use this Agreement in support of its request to the court to dismiss the lawsuit and require me instead to use arbitration.

I understand that I still may file administrative charges with the Equal Employment Opportunity Commission or similar federal, state or local agency, but that upon receipt of a right-to-sue letter or similar administrative determination, I shall arbitrate any claim that I may have against Circuit City.

I understand that I must file a claim for arbitration within one (1) year of the day on which I learned or, through reasonable diligence, should have learned that my legal rights were violated. I further agree that if I commence an arbitration, it will be conducted in accordance with the "Circuit City Dispute Resolution Rules and Procedures."

I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me. I further understand that my signature to this Agreement in no way guarantees that Circuit City will accept my application for employment. If Circuit City does accept my application for employment and I become employed at Circuit City, this Agreement in no way alters the "at-will" status of my employment. I understand that my employment, compensation and terms and conditions of employment can be altered or terminated, with or without cause, and with or without notice, at any time, at the option of either Circuit City or myself. I understand that no store manager or representative of Circuit City, other than an Officer of Circuit City at the level of Vice President or above, has any authority to enter into any agreement for employment for any specific duration, to make any agreement contrary to the foregoing or to alter the Circuit City Dispute Resolution Rules and Procedures.

The Dispute Resolution Agreement and the Dispute Resolution Rules and Procedures affect your legal rights. You may wish to seek legal advice before signing this Dispute Resolution Agreement.

I have read this Agreement and understand that I should read the Dispute Resolution Rules and Procedures over the next few days.

I understand that I may withdraw my consent to this Agreement within three (3) days from the date on which I sign below by notifying the Applicant Screening Department in writing (including my Social Security number and the name of the place at which I applied for employment) that I am withdrawing my application for employment at Circuit City. The address for the Applicant Screening Department is:

Circuit City Stores, Inc.
Applicant Screening Department
9960 Mayland Drive
Richmond, VA 23233

I understand that by so notifying the Applicant Screening Department, I will not be bound to this Agreement and that I no longer will be eligible for employment at Circuit City. I recognize that if I sign the Agreement and do not withdraw within three days of signing I will be required to arbitrate any and all employment-related claims I may have against Circuit City, whether or not I become employed by Circuit City.

This Agreement will be enforceable throughout the application process, my employment, and thereafter with respect to any claims arising from or relating to my application or candidacy for employment, employment or cessation of employment with Circuit City. I then must arbitrate all my employment-related claims, and I may not file a lawsuit in court.

AGREED:

_____ Date: 10-23-95
Signature

547-45-8663
Social Security No.

Circuit City agrees to follow this Dispute Resolution Agreement and the Dispute Resolution Rules and Procedures in connection with the Associate whose signature appears above.

_____
William E. Zierden
Senior Vice President, Human Resources
Circuit City Stores, Inc.

Exhibit A Page 3 of 6

STOP!

IF YOU HAVE NOT SIGNED THE AGREEMENT...

If you have decided **not** to agree to the terms of the preceding DISPUTE RESOLUTION AGREEMENT then you do not need to complete the balance of this application. We appreciate your interest in the company.

IF YOU HAVE SIGNED THE AGREEMENT...

If you have decided at this time to **agree** to the terms of the preceding DISPUTE RESOLUTION AGREEMENT then you will need to complete the balance of this application so that we can continue with your application process.

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EDUCATION AND TRAINING

CIRCLE LAST YEAR OF EDUCATION COMPLETED

GRADE SCHOOL 9 10 11 12 (13) (14) 15 16 17 18 19 20

HIGH SCHOOL ATTENDED: EUREKA HIGH — GRADE AVG.: 3.1

BUSINESS SCHOOL, TRADE SCHOOL, COLLEGE OR UNIVERSITY ATTENDED	COURSE OF STUDY (MAJOR AREA OF STUDY)	YRS. ATTENDED	DEGREE REC'D	GRADE AVG.
NAME: HEALD COLLEGE CITY & STATE: 474 ST. SAN FRANCISCO	ELECTRONICS	FROM 19 82 TO 19 83		3.7
NAME: COLLEGE OF THE REDWOODS CITY & STATE: EUREKA CA	GENERAL	FROM 19 81 TO 19 82		3.0
NAME: CITY & STATE:		FROM 19____ TO 19____		
NAME: CITY & STATE:		FROM 19____ TO 19____		

LIST ANY BUSINESS MACHINES YOU ARE CAPABLE OF OPERATING AND ANY OTHER SPECIAL SKILLS RELEVANT TO THE POSITION FOR WHICH YOU ARE APPLYING.

- [X] ADDING MACHINE
- [X] TYPEWRITER
- [ ] FORK LIFT
- [X] WORD PROCESSOR/COMPUTER
- [X] CALCULATOR
- [X] SWITCHBOARD
- [X] CASH REGISTER
- [X] SOFTWARE TRAINED IN _____

OTHER: _____

LIST ANY HOBBIES, INTERESTS, OR ANY OTHER SKILLS OR HONORS WHICH HAVE A DIRECT BEARING ON THE JOB YOU ARE SEEKING. IDENTIFY ANY LANGUAGES, OTHER THAN ENGLISH, YOU CAN SPEAK AND UNDERSTAND. YOU ARE NOT REQUIRED TO LIST ANY INFORMATION WHICH MIGHT REVEAL YOUR RACE, RELIGION, SEX OR NATIONAL ORIGIN.

EMPLOYMENT HISTORY

LIST ALL JOBS, MILITARY SERVICE, VERIFIABLE VOLUNTEER WORK AND SELF-EMPLOYMENT IN THE USA, BEGINNING WITH PRESENT JOB. INCLUDE ANY PERIODS OF UNEMPLOYMENT GREATER THAN 1 MONTH IN DURATION. PRINT CLEARLY.

YOU MUST COMPLETE THIS SECTION IN ITS ENTIRETY EVEN IF YOU INCLUDE A RESUME.

NAME OF COMPANY, ADDRESS, STATE TELEPHONE NUMBER	DATES OF EMPLOYMENT MONTH-YEAR	RATE OF PAY	NAME & PHONE NUMBER OF SUPERVISOR	DUTIES & RESPONSIBILITIES	REASON FOR LEAVING
CO. NAME EMERALD CITY STREET P.O. BOX 816 CITY & STATE WINDSOR CA PHONE # 707-575-4648 JOB TITLE OWNER	4-88 FROM CURRENT TO VARIOUS # HRS/WK	STARTING ENDING CIRCLE: HR WK MO YR	NAME OF SUPERVISOR ( ) (AREA) PHONE # MAY WE CONTACT? ☐ YES ☐ NO	SALES, SERVICE COMPUTER REPAIR TRAINING, AND DATA PROCESSING	NOT LEAVING SEEKING SUPPLEMENT INCOME
CO. NAME MCI STREET 201 SPEAR ST CITY & STATE SAN FRANCISCO PHONE # 415-978-1100 JOB TITLE NETWORK ADMINISTRATOR CUSTOMER SERVICE	1985 FROM 1991 TO 37 # HRS/WK	15,000 STARTING 32,000 ENDING CIRCLE: HR WK MO (YR)	PERSONEL NAME OF SUPERVISOR (415) 978-1100 (AREA) PHONE #	COMPUTER INPUT, SUPERVISION CUSTOMER SERVICE NETWORK ENGINEERING	COMPANY LAY O
CO. NAME SUPER SHIRTS STREET JEFFERSON ST CITY & STATE SAN FRANCISCO PHONE # UNKNOWN JOB TITLE ASS. STANT MGR	1984 FROM 1985 TO 45 # HRS/WK	13,000 STARTING SAME ENDING CIRCLE: HR WK MO (YR)	PERSONEL NAME OF SUPERVISOR (UNKNOWN (AREA) PHONE #	INVENTORY, PERSONEL SUPERVISON, SCHEDULING, SALE, BANKING	LEFT TO FOR MC
CO. NAME DENNYS STREET C ST CITY & STATE EUREKA, CA PHONE # UNKNOWN JOB TITLE HOST/CASHIER SHIFT SUPERVISOR	1980 FROM 1982 TO # HRS/WK	3.50 STARTING 4.75 ENDING CIRCLE: (HR) WK MO YR	PERSONEL NAME OF SUPERVISOR (UNKNOWN (AREA) PHONE #	CUSTOMER SERVICE CASHIERING SHIFT SUPERVISION	MOVE TO SAN FRA
CO. NAME ~~BANK OF AMERICA~~ STREET MONTGOMERY CITY & STATE SAN FRANCISCO PHONE # UNKNOWN JOB TITLE FILE CLERK	1982 FROM 1984 TO 37 # HRS/WK	8,750 STARTING SAME ENDING CIRCLE: HR WK (MO)	PERSONEL NAME OF SUPERVISOR (UNKNOWN (AREA) PHONE #	DOCUMENT FILING	LEFT FO SUPER SH

HAVE YOU EVER WORKED FOR CIRCUIT CITY OR ANY OF ITS SUBSIDIARIES? ☐ YES ☒ NO
IF YES, WHERE _____ FROM _____ TO _____

HAVE YOU, WITHIN THE LAST TWELVE MONTHS, APPLIED FOR A POSITION WITH CIRCUIT CITY OR ANY OF ITS SUBSIDIARIES? ☐ YES ☒ NO IF YES, WHERE _____
APPROXIMATE DATE _____

DO YOU HAVE ANY FRIENDS OR RELATIVES EMPLOYED BY CIRCUIT CITY? ☐ YES ☒ NO
IF YES, PLEASE IDENTIFY _____

BEST AVAILABLE COPY

SOURCE OF REFERRAL: ☐ NEWSPAPER AD ☐ EMPLOYMENT AGENCY OTHER (SPECIFY)
☐ CURRENT CCS EMPLOYEE ☐ STATE EMPLOYMENT AGENCY Walk in
☐ COLLEGE RECRUITING ☐ FORMER CCS EMPLOYEE

ARE YOU ELIGIBLE TO WORK IN THE USA? ☒ YES ☐ NO

IF UNDER 18 YEARS OF AGE DO YOU HAVE A WORK PERMIT? ☐ YES ☐ NO
N/A

HAVE YOU, SINCE THE AGE OF 18, BEEN CONVICTED OF A FELONY? ☐ YES ☒ NO
IF YES, PLEASE EXPLAIN. _____
A CONVICTION WILL NOT NECESSARILY EXCLUDE YOU FROM EMPLOYMENT. EACH CONVICTION WILL BE JUDGED ON ITS OWN MERITS WITH RESPECT TO THE TIME, CIRCUMSTANCES AND SERIOUSNESS.

SPECIFIC TITLE OF POSITION APPLIED FOR: SALES - COMPUTER SERVICE
TYPE OF WORK DESIRED: ☒ FULL TIME ☐ REGULAR ☒ PART TIME ☐ SEASONAL

DATE AVAILABLE TO BEGIN WORK: 10-23-95
SALARY/WAGE EXPECTED: $ _____ PER YR. $ _____ PER HR. SCALE

LIST HOURS AND DAYS YOU ARE AVAILABLE TO WORK.

	SUN.	MON.	TUE.	WED.	THU.	FRI.	SAT.
FROM		←	OPEN			→	
TO							

PLEASE READ CAREFULLY AND SIGN BELOW:

I hereby certify that all of the information contained in this application is complete and accurate to the best of my knowledge. I understand that, if employed, omissions or false or inaccurate statements on this application or the Loss Prevention interview may result in dismissal.

I hereby authorize all prior employers, schools, credit bureaus, Social Security Administration, law enforcement agencies and investigative agencies to give Circuit City Stores, Inc. any and all information concerning my previous employment and any pertinent information they may have, personal or otherwise, concerning my qualifications for the position applied for. I release all persons or entities from all liability for any damage that may result from furnishing information to Circuit City Stores, Inc. I also release Circuit City Stores, Inc. and all of its employees from all liability for any damage that may result from reliance on the information furnished. I understand that if a consumer investigative report is requested, I have the right under the Fair Credit Reporting Act to request in writing, within a reasonable time, a complete and accurate disclosure of the nature and scope of the investigation. This written request should be addressed to the location where this application is filed.

If employed by Circuit City Stores, Inc., I agree to abide by its policies, rules and regulations. I understand and agree that my employment is at-will, and therefore, my employment and compensation can terminate, with or without cause, at any time, at my option or the option of Circuit City Stores, Inc. I further understand and agree that this at-will employment relationship will remain in effect throughout my employment with Circuit City Stores, Inc. or any of its affiliated companies, unless it is modified by a specific written employment contract for a special duration which is signed by an officer of Circuit City Stores, Inc. at the level of Vice President or above and me. This at-will employment relationship may not be modified by any oral or implied agreement.

I understand that this application is completed for the position or positions indicated on page 6 and that it will be necessary to reapply for other positions when they become available. I also understand that this application is good for only thirty (30) days from today's date. If I still desire to be considered for a position with the company after this application expires, it will be my responsibility to complete a new application and file it with the company.

[signature] 10-23-95
SIGNATURE OF APPLICANT DATE SIGNED

CENHMTD1 NEW HIRE MAINTENANCE SCREEN 1 S2PERDISPW
CENHMTR1 COPPER

Emp	SS#	Last Name	First Name	Loc	Status	Appl Date	Scren C
CCS	547548663	ADAMS	ST CLAIR	0237	TMFT		

Hire Dt	Fax Dt	Orig Dt	S Tax	F Tax	I - 9	Visa Exp
120195						

ADR Date	ADR Code	Medical Med Ap/Wv C Cov	Dental Dnt Ap/Wv C Cov	Life/Sp Ap/Wv C	LTD Ap/Wv C	New Assoc C

TJTC Form C	Mag-Moss Date C	Srv Tch Cond C	Notify Emplr C	CC Sls Cnslr C	CC Sls Comp C	Check Dedct C	Casual Labor C

Hist Sheet Reprint	Labels Only	Paperwrk Comp Date
N		13096

CMD3=EXIT CMD12=PREV. CMD14=PROMPT CMD24=DELETE

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Exhibit B Page 1 of 1

Exhibit C [to Declaration of Pamela G. Parsons]

CIRCUIT

CITY

Dispute Resolution

Rules and Procedures

Dear Circuit City Applicant:

Thank you for considering employment with Circuit City. Circuit City has enjoyed tremendous success and growth over the past several years. Our associates have played an integral role in our success, and Circuit City works very hard to treat all applicants and associates fairly and with respect.

As you read through our employment application, you will note that Circuit City has implemented an arbitration procedure to provide quick, fair, final and binding resolution of employment-related legal claims. If you have signed Circuit City's Dispute Resolution Agreement and then wish to withdraw your consent, you must do so within three (3) days. Please notify Circuit City's Applicant Screening Department in writing (including your Social Security number and the name of the place at which you applied for employment) that you no longer desire for Circuit City to consider your application for employment. The address for the Applicant Screening Department is:

Circuit City Stores, Inc.
Applicant Screening Department
9960 Mayland Drive
Richmond, VA 23233

We appreciate your interest in Circuit City and hope you decide to start the application process by signing the Dispute Resolution Agreement and completing the employment application.

CIRCUIT CITY DISPUTE RESOLUTION RULES AND PROCEDURES

Rule 1. PURPOSE

Circuit City (the Company) has established an employment dispute resolution procedure, culminating in formal arbitration, designed to provide Associates with a fair, private, exclusive, expeditious, final and binding means for resolving legal disputes arising out of, or relating to, their employment with Circuit City, without the need for litigation in federal, state or local courts. These Dispute Resolution Rules and Procedures govern arbitrations held pursuant to the Circuit City Dispute Resolution Agreement.

Rule 2. CLAIMS SUBJECT TO ARBITRATION

Except as otherwise limited herein, any and all employment-related legal disputes, controversies or claims of an Associate arising out of, or relating to, an Associate's application or candidacy for employment, employment or cessation of employment with Circuit City or one of its affiliates shall be settled exclusively by final and binding arbitration before a neutral, third-party Arbitrator selected in accordance with these Dispute Resolution Rules and Procedures. Arbitration shall apply to any and all such disputes, controversies or claims whether asserted against the Company and/or against any employee, officer, alleged agent, director or affiliate company.

All previously unasserted Associate claims arising under federal, state or local statutory or common law shall be subject to arbitration. Merely by way of example, these claims include, but are not limited to, claims arising under the

Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, as amended, including the amendments of the Civil Rights Act of 1991, the Employee Polygraph Protection-Act,-the. Employee Retirement Income Security Act (ERISA), the National Labor Relations Act, state discrimination statutes, state statutes and/or common law regulating employment termination, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/ negligent infliction of emotional distress or defamation.

Claims by Associates for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) shall not be subject to arbitration. Statutory or common law claims alleging that Circuit City retaliated or discriminated against an Associate for filing a state employment insurance claim, however, shall be subject to arbitration.

Rule 3. DISMISSAL/STAY OF COURT PROCEEDINGS

By agreeing to the Dispute Resolution Program, an Associate agrees to resolve through arbitration all claims described in or contemplated by Rule 2. If an Associate files-a lawsuit in court to resolve claims subject to arbitration, the Associate agrees that the Court shall dismiss the lawsuit and require the Associate to arbitrate the dispute.

If an Associate files a lawsuit in court involving claims which are, and other claims which are not, subject to arbitration, the Associate agrees that the court shall stay litigation of the nonarbitrable claims and require that arbitration take place with respect to those claims subject to arbitration. The Associate further agrees that the Arbitrator's decision on the arbitrable claims, including any determinations as to disputed factual or legal issues, shall be entitled to full force and effect in any later court lawsuit on any nonarbitrable claims.

Rule 4. COMMENCEMENT OF ARBITRATION

Rule 5. PROCEDURE

An Associate shall commence an arbitration by filing the attached Circuit City Associate Arbitration Request Form with a required filing fee of $75 (made payable with a cashier's check or money order to Circuit City Stores, Inc.) to:

Arbitration Coordinator
Circuit City Stores, Inc.
9960 Mayland Drive
Richmond, Virginia 23233-1464

Rule 6. TIME LIMITS

a. FILING OF REQUEST FOR ARBITRATION

The "Circuit City Associate Arbitration Request Form" shall be submitted not later than one year after the date on which the Associate knew, or through reasonable diligence should have known, of the facts giving rise to the Associate's claim(s). The failure of an Associate to initiate an arbitration within the one-year time limit shall

constitute a waiver with respect .to that dispute relative to- that Associate.

b. CIRCUIT CITY'S RESPONSE

Within 21 calendar days of receipt of an Associate's Arbitration Request Form and the accompanying filing fee, the Company shall send the Company's Response to the Associate via certified or registered mail, or hand delivery.

The Response, which also shall be mailed to the Associate's attorney if one has been retained, shall describe the Company's position regarding the allegations in the Associate's Arbitration Request Form.

Rule 7. NOTICE/OTHER FILINGS

All other communications, notices or filings, including discovery requests and responses, shall be in writing and shall be deemed to have been given if (i) delivered by hand to a person of suitable age and discretion; or (ii) mailed first class, registered mail, postage prepaid, as follows:

If to Circuit City: Arbitration Coordinator
Circuit City Stores, Inc.
9960 Mayland Drive
Richmond, Virginia 23233-1464

If to the Associate: (i) to the Associate's address of record as it appears on the Arbitration Request Form; or

(ii) to the Associate's attorney as designated in the Arbitration Request Form or

later designated in writing by the Associate.

Rule 8. SELECTION OF AN ARBITRATOR

Circuit City and the Associate shall participate equally in the selection of an Arbitrator to decide the arbitration. Within 21 calendar days after the Company receives the Associate's Arbitration Request Form, the American Arbitration Association (AAA) shall be asked to provide a panel of seven (7) neutral arbitrators with experience deciding employment disputes. The Company and the Associate then shall have the opportunity to review the background of the arbitrators by examining the materials provided by the AAA. Within seven (7) calendar days after the panel composition is received, the Associate and the Company each shall inform the AAA which arbitrators the Parties find unacceptable for deciding the dispute. The AAA then will appoint an Arbitrator from among the named individuals the Parties found acceptable.

Rule 9. TIME AND PLACE OF ARBITRATION

The arbitration hearing shall be held at the offices of, or a location selected by, the AAA. in the city nearest the location of the Associate's last employment with the Company, unless the Parties agree otherwise. If the AAA does not select an arbitration location within fifty (50) miles of the city of the Associate's last employment with the Company, the Associate and the Company shall designate a mutually amenable location at which to hold the arbitration.

The Parties and the Arbitrator shall make every effort to see that the arbitration is completed, and an award rendered, as soon as possible. There

shall be no extensions of time or delays of an arbitration hearing except in cases where both Parties consent to the –extension or delay, or where the Arbitrator finds such a delay or extension necessary to resolve a discovery dispute or other matter relevant to the arbitration.

Rule 10. REPRESENTATION

Both the Associate and the Company shall have the right to be represented by counsel.

Rule 11. DISCOVERY

Rule 12. INITIAL DISCLOSURE

Within fourteen (14) calendar days following the appointment of an Arbitrator, the Parties shall provide each other with copies of ail documents (except for privileged documents that are protected from disclosure because they involve attorney-client, doctor-patient or other -legally privileged or protected communications or materials) upon which they rely in support of their claims or defenses. Throughout the discovery phase, each Party shall provide the opposing Party with any and all documents relevant to any claim or defense.

Upon request, the Associate shall be entitled to a copy of all documents (except privileged documents as described above) in the Associate's "PERSONNEL RECORDS FILE."

Rule 13. OTHER DISCOVERY

a. INTERROGATORIES/ DOCUMENT REQUESTS

Each Party may propound one set of 20 interrogatories (including subparts) to the opposing Party. Interrogatories are written

questions asked by one party to the other, who must answer under oath. Such interrogatories may include a request for all documents upon which the responding party relies in support of its answers to the interrogatories. Answers to interrogatories must be served within 21 calendar days of receipt of the interrogatories.

b. DEPOSITIONS

A deposition is a statement under oath that is given by one party in response to specific questions from the other party, and usually is recorded or transcribed by a court reporter. Each Party shall be entitled to take the deposition of up to three (3) individuals of the Party's choosing. The Party taking the deposition shall be responsible for all costs associated therewith, such as the cost of a court reporter and the cost of a transcript.

c. ADDITIONAL DISCOVERY

Upon the request of any Party and a showing of substantial need, the Arbitrator may permit additional discovery, but only if the Arbitrator finds that such additional discovery is not overly burdensome, and will not unduly delay conclusion of the arbitration.

Rule 14. DISCOVERY DISPUTES

The Arbitrator shall decide all disputes related to discovery. Such decisions shall be final and binding on the Parties. In ruling on discovery disputes, the Arbitrator shall be guided by the discovery rules contained -in the Federal Rules of. Civil Procedure.

Rule 15. TIME FOR COMPLETION OF DISCOVERY

All discovery shall be completed in an expeditious manner. In order to expedite the arbitration, the Parties may initiate discovery prior to the appointment of the Arbitrator. The Parties and the Arbitrator shall make every effort to complete all discovery within sixty (60) calendar days after the selection of the Arbitrator.

Rule 16. HEARING PROCEDURE

Rule 17. WITNESSES

Witnesses shall testify under oath, and the Arbitrator shall afford each Party a sufficient opportunity to examine its own witnesses and cross-examine witnesses of the other Party. Either Party may issue subpoenas compelling the attendance of any other person necessary for the issuing Party to prove its case.

a. SUBPOENAS

A subpoena is a command to an individual to appear at a certain place and time and give testimony. A subpoena also may require that the individual bring documents when he or she gives testimony. The Arbitrator shall have the authority to enforce and/or cancel such subpoenas provided that such subpoenas are issued no less than 10 calendar days prior to the commencement of an arbitration hearing or deposition. The Party issuing the subpoena shall be responsible for the fees and expenses associated with the issuance and enforcement of the subpoena, and with the attendance of the subpoenaed witness at the arbitration hearing.

b. SEQUESTRATION

The Arbitrator shall ensure that all witnesses who will testify at the arbitration are not influenced by the testimony of other witnesses. Accordingly, the Arbitrator may sequester all witnesses who will testify at the arbitration, provided that the Arbitrator shall permit the Associate bringing the arbitration and the Company's designated representative to remain throughout the arbitration, even though they may or may not testify at the hearing.

Rule 18. EVIDENCE

The parties may offer evidence that is relevant and material to the dispute and shall produce any and all nonprivileged evidence which the Arbitrator deems necessary to a determination of the dispute. The Arbitrator need not specifically follow the Federal Rules of Evidence, although they may be consulted to resolve questions regarding the admissibility of particular matters.

Rule 19. BURDEN OF PROOF

An Associate has the burden of proving a claim or claims by a preponderance of the evidence. To prevail, an Associate must prove that the Company's conduct with respect to the Associate was a violation of applicable law

Rule 20. BRIEFING

Each Party shall have the opportunity to submit one pre-hearing and one post-hearing brief, which is a written statement of facts and law, in support of its position. Briefs shall be typed and shall be limited in length to 20 double-spaced pages.

Pre-hearing briefs may be submitted no later than ten (10) calendar days prior to a scheduled arbitration hearing. Post-hearing briefs may be submitted no later than twenty (20) calendar days after the Parties receive the transcript of the arbitration from the reporting service.

Rule 21. TRANSCRIPTION

The Parties may arrange for transcription of the arbitration by a certified reporter. The parties shall share evenly the costs of the reporter and transcription, subject to the provisions of Rule 13 below.

Rule 22. CONSOLIDATION

a. CLAIMS

The Arbitrator shall have the power to hear as many claims as an Associate may have against the Company consistent with Rule 2 of these Dispute Resolution Rules and Procedures. The Arbitrator may hear additional claims that were not mentioned in the Arbitration Request Form, provided the Associate adding claims notifies the Company at least 30 calendar days prior to a scheduled arbitration, the additional claims are timely as of the date on which they are added and the Company is not prejudiced in its defense by such addition.

b. PARTIES

The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves an arbitration or lawsuit where representative members of a large group who

claim to share a common interest seek relief on behalf of the group).

Rule 23. CONFIDENTIALITY

All aspects of an arbitration pursuant to these Dispute Resolution Rules and Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public, except (i) to the extent both Parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the parties, or (iii) as may otherwise be appropriate in response to a governmental agency or legal process.

All settlement negotiations, mediations, and the results thereof shall be confidential.

Rule 24. SUBSTANTIVE CHOICE OF LAW

The Arbitrator shall apply the substantive law of the State in which the Associate is or was predominantly employed. For claims arising under federal law, the Arbitrator shall. follow the substantive law applicable to the United States District Court for the District in which the Associate is or was predominantly employed.

Rule 25. ARBITRATOR AUTHORITY

The Arbitrator shall conduct the arbitration and shall have the authority to render a decision in accordance with these Dispute Resolution Rules and Procedures, and in a manner designed to promote rapid and fair resolution of disputes.

Rule 26. JURISDICTION

The Arbitrator's authority shall be limited to deciding the case submitted by the Associate. Unless the Associate is subject to a contract

providing for the employment of the Associate under specified terms or for a given duration, the Associate's employment remains alterable at the discretion of the Company and/or terminable at any time, at the will of either the Associate or the Company, with or without just cause. Accordingly, the Arbitrator shall have.no authority to require that Circuit City have "just cause" to discipline or discharge an Associate or to change the terms and conditions of employment of an Associate unless specifically required by federal, state or local law, or as a remedy for a violation of applicable law by the Company with respect to the Associate.

Rule 27. SANCTIONS

The Arbitrator shall have the power to award sanctions against a Party for the Party's failure to comply with these Dispute Resolution Rules and Procedures or with an order of the Arbitrator. These sanctions may include assessment of costs, prohibitions of evidence, or, if justified by a Party's wanton or willful disregard of these Dispute Resolution Rules and Procedures, an adverse ruling in the arbitration against the Party who has failed to comply.

Rule 28. AWARD

Within 21 calendar days after receipt of post-hearing briefs, if any, the Arbitrator shall mail to the parties a written award specifying appropriate remedies, if any. In the Arbitrator's discretion, the award may include findings of fact and conclusions of law.

The Parties to an arbitration shall be provided with a copy of the Arbitrator's award.. Other Associates who have agreed to arbitration may

request copies of arbitration decisions in a given case. In cases where an arbitration decision is provided to an Associate who was not a Party to the particular arbitration, the Party-Associate's name shall be deleted from the arbitration decision unless the Party-Associate agrees otherwise in writing.

Rule 29. FEES AND EXPENSES

Rule 30. COSTS OTHER THAN ATTORNEY FEES

1. Definitions

Costs of an arbitration include the daily or hourly fees and expenses (including travel) of the Arbitrator who decides the case, filing or administrative fees charged by the AAA, the cost of a reporter who transcribes the proceeding, and expenses of renting a room in which the arbitration is held. Incidental costs include such items as xeroxing or the costs of producing witnesses or proof.

2. Filing Fee/Costs of Arbitration

An Associate initiating an arbitration shall pay a filing fee of seventy-five dollars ($75) made payable with a cashier's check or money order to Circuit City Stores, Inc. Circuit Cify -shall advance the remainder of the costs of the arbitration. Each Party shall advance its own incidental costs and pay its own attorney fees. Subject to the other provisions of this . Rule set forth below, each Party shall pay one-half of the costs of arbitration following the issuance of the arbitration award.

3. Shifting of Costs

If the Associate prevails in arbitration, whether or not monetary damages of remedies are awarded,

the filing fee shall be refunded to the Associate, and the Arbitrator may require that Circuit City pay the Associate's share of the costs of arbitration and incidental costs. If Circuit City prevails in arbitration, the Arbitrator may require the Associate to pay Circuit City's share of the costs of arbitration and incidental costs.

4. Payment of Costs

The Parties shall pay all previously unpaid arbitration costs within ninety (90) calendar days of the issuance of the arbitration award. If the Associate is required to pay some or all of the costs or fees of arbitration and either pays, or makes arrangements to pay, said costs or fees within ninety (90) calendar days after the issuance of the arbitration award, the Associate's liability for the costs and fees of arbitration, other than attorney fees, shall be limited to three percent (3%) of the Associate's most recent annual compensation at Circuit City. If the Associate fails to pay, or fails to make arrangements to pay, the Associate's share of fees and costs within ninety (90) calendar days, the three percent (3%) cap shall not apply.

If the Associate fails to pay within ninety (90) calendar days, and the Associate is still employed by the Company, Circuit City may deduct the amount owed from the Associate's paycheck. Such deduction may not exceed a rate of five percent (5%) of the Associate's compensation per pay period.

Rule 31. ATTORNEY FEES

Each Party generally shall be liable for its own attorney fees. If the Associate prevails in arbitration, the Arbitrator shall have discretion to

award the Associate reasonable attorney fees. If Circuit City prevails in the arbitration, the Arbitrator shall have discretion to require the Associate to pay the Company's reasonable attorney fees if the Arbitrator finds that the Associate's claim was frivolous, or presented in bad faith or for an improper purpose, such as to harass the Company.

An award of attorney fees to either Party shall. be reasonable in light of the amount and complexity of work involved in the arbitration, and in accordance with customary billing rates of attorneys in the geographic area in which the arbitration is held.

Rule 32. REMEDIES AND DAMAGES

If the Arbitrator finds for the Associate, the Arbitrator, in his discretion, may award one or more of the following:

1. Injunctive relief, including reinstatement to the position of employment the Associate held or, if such reinstatement is impractical, to a comparable position-at-the location of the Associate's last employment;

2. If reinstatement at the place of the Associate's last employment is not practical, reinstatement to a comparable position at Circuit City in the same general geographic market area;

3. Full or partial back pay and reimbursement for lost fringe benefits, but only up to one year from the point at which the Associate knew or should have known of the events giving rise to the alleged violation of law, with interest, reduced by interim earnings, public or private benefits received, and

amounts that could have been received with reasonable diligence;

4. If reinstatement is not practical or reasonable under the circumstances, recognizing that in only rare cases will reinstatement be impractical but nevertheless warranted, the Arbitrator may award up to 24 months of front pay in lieu of reinstatement;

5. Compensatory damages in accordance with applicable law;

6. Punitive damages in an amount up to the greater of:

(a) an amount equal to the monetary award, if any, rendered pursuant to Subsections 3 and/or 4 of this Rule; or

(b) $5,000.

Rule 33. SETTLEMENT

The Parties may settle their dispute at any time. Prior to closure of the arbitration hearing, the Parties may settle the case without involvement of the Arbitrator. Once the hearing has closed, settlement may take place only with approval of the Arbitrator.

At any point prior to the Arbitrator's issuance of an award, the Parties may, by agreement, refer their dispute to mediation before a mediator provided by the AAA.

Rule 34. ENFORCEABILITY

The Dispute Resolution Agreement and any award rendered pursuant to it shall be enforceable and subject to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. and the Uniform Arbitration Act of Virginia, 8.01-581.01 et seq., regardless of

the State in which the arbitration is held or the substantive law applied in the arbitration.

Rule 35. APPEAL RIGHTS

The award rendered by the Arbitrator shall be final and binding as to both the Associate and the Company. Either party may appeal the Arbitrator's decision to a court in accordance with the appeal procedures of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. or the Uniform Arbitration Act of Virginia, 8.01-581.01 et seq.

Rule 36. SEVERABILITY/CONFLICT WITH LAW

In the event that any of these Dispute Resolution Rules and Procedures agreed upon by the Parties is held to be in conflict with a mandatory provision of applicable law; the conflicting Rule or Procedure shall be modified automatically to comply with the mandatory provision of applicable law until such point as these Dispute Resolution Rules and Procedures maybe modified in accordance with Rule 19 below. In the event of an automatic modification with respect to a particular Rule or Procedure, the remainder of these Rules and Procedures shall not be affected. An automatic modification of one of these Rules or Procedures shall be applicable only in the jurisdiction. in which it is in conflict ,~vith a mandatory provision of--law. In all other jurisdictions, these Dispute Resolution Rules and Procedures shall apply in full force and effect.

Rule 37. TERMINATION OR MODIFICATION OF DISPUTE RESOLUTION AGREEMENT OR DISPUTE RESOLUTION RULES AND PROCEDURES

Circuit City may alter or terminate the Agreement

and these Dispute Resolution Rules and Procedures on December 31st of any year upon giving 30 calendar days written notice to Associates, provided that all claims arising before alteration or termination shall be subject to the Agreement and corresponding Dispute Resolution Rules and Procedures in effect at the time the claim arose. An Associate shall be deemed to have accepted a modification or termination of the Dispute Resolution Agreement or the Rules and Procedures by accepting or continuing employment with Circuit City after receiving notice of such modification or termination.

CIRCUIT CITY.

Circuit City Stores, Inc.
9950 Maryland Drive
Richmond, VA 23233-1464

Where Service is State of the Art®

ARBITRATION REQUEST FORM

(Please Print or Type)

Name: SAINT CLAIR ADAMS Social Security No.: 547-45-0663

Telephone: (707) 575-4648

Address of Record: P.O. Box 816 — Windsor
Street City

CA 95492
State Zip

Position: Sales Counselor (Home/Off Status (full or part time): was F/T

Date of Hire: November 3, 1995 Date of Incident: February 27, 1996 through November 30, 1996

Store/Place of Employment: Santa Rosa

Please state the dispute you wish to have decided by an Arbitrator. Please explain why you believe the Company's actions were unlawful and state the basis for your claim (e.g., discrimination on the basis of sex, race, religion, national origin, etc., retaliation for filing of workers' compensation claims or other).

Sexual harassment by fellow employees and supervisors; supervisors' failure to remedy situation in a timely manner; discrimination on the basis of sex/gender and sexual orientation; created hostile work environment which forced my resignation (constructive discharge); all of the aforementioned caused substantial emotional distress. All incidents were reported to supervisors, yet nothing was done for several months.

(Please attach additional sheets if necessary)

Please include the names of any witnesses to the Company's alleged unlawful action.

Scott Stevens; Derrick Iman; Geoff Collins; Garret Belcher; Steve Svanson; Braden Mears; Skip Miller; James Galimo; Gerry Geisinger; Randy Tusi; Eve Hawkins; Cory Day; Sonya Minkle; and Tom Prince

BEST AVAILABLE COPY

That Circuit City acknowledge its lack of a timely response to my complaints and develop adequate sensitivity training; that Circuit City compensate me for the income, benefits, and work experience I lost as a result of the aforementioned unlawful acts; that I be further compensated for the resulting emotional distress I was forced to endure.

(Please attach additional sheets if necessary)

If you will be represented by an attorney, please identify that person below.

ANGELA ALIOTO

Name of Representative

LAW OFFICES OF JOSEPH L. ALIOTO & ANGELA ALIOTO

538 Sacramento Street, 4th Floor, San Francisco, CA 94111

Address

(415) 434-8700

Telephone

I hereby submit the above-described dispute for arbitration. I agree to accept the decision and award of the Arbitrator as final and binding as to all claims relating to my employment relationship with Circuit City or its affiliate which have been or could have been raised under my Arbitration Agreement with Circuit City. I understand that to initiate this arbitration, I must submit with this Request Form a filing fee of seventy-five dollars ($75) in the form of a cashier's check or money order made payable to Circuit City Stores, Inc. I understand that unless the Arbitrator rules otherwise, I will be responsible for the fees of my own attorney should I retain one and for one-half of the arbitration fees and expenses, as set forth in Rule 13 of the Circuit City Dispute Resolution Rules and Procedures.

SIGNED:

Associate — December 5, 1997 — Date

By: Associate's Attorney — Law Offices of Joseph L. Alioto & Angela Alioto — December 5, 1997 — Date

Exhibit D Page 2 of 2

-CONFIDENTIAL-

CIRCUIT CITY
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-CONFIDENTIAL-

ARBITRATION RESPONSE FORM

Saint Clair Adams
Name of Associate Requesting Arbitration

547-45-8663
Social Security No.

Associate's Immediate Supervisor

12/ 9 / 97
Date of Receipt of Arbitration Request Form

Circuit City's position regarding the allegations in the Arbitration Request Form of the above-named Associate:

Circuit City denies the allegations made by Mr. Adams, and further denies that Mr. Adams is entitled to any relief whatsoever.

(Please attach additional sheets if necessary)

Please designate who will represent Circuit City in the Arbitration.

Rex Darrell Berry
Name of Representative

Davis, Grimm & Payne

1111 - 3rd Avenue, Suite 1865, Seattle, WA, 98101
Address

(206) 447-0182
Telephone

I hereby certify that the foregoing Circuit City Arbitration Response Form was sent via first class mail on 12/30/97 to St. Clair Adams, c/o Angela Alioto, the Associate requesting arbitration, at the following address:

Law Offices of Joseph L. Alioto and Angela Alioto
558 Sacramento St., 4th Floor
San Francisco, CA 94111

Signature of Company Representative

12/29/97
Date

Attorney
Title

Exhibit E Page 1 of 1

REX DARRELL BERRY, ESQ. (CSB#110219)
DAVIS, GRIMM & PAYNE
1111 Third Avenue, Suite 1865
Seattle, WA 98101
Telephone: (206) 447-0182
[Northern District Admission Pending]

ROSEMARY KIRBACH, ESQ. (CSB#149465)
PAUL HASTING JANOFSKY & WALKER LLP
345 California Street, 29th Floor
San Francisco, CA 94104-2635
Telephone: (415) 835-1600

Attorneys for Petitioner
CIRCUIT CITY STORES, INC.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIRCUIT CITY STORES, INC., a Virginia corporation, Petitioner/Plaintiff, vs. SAINT CLAIR ADAMS, a California resident, Respondent/Defendant.	CASE NO. C98-0365 CAL OPINION AND ORDER STAYING STATE COURT ACTION AND COMPELLING ARBITRATION AND DENYING RULE 11 SANCTIONS

THIS MATTER, having come regularly before the Court and the Court having considered the Notice of Hearing on Petition to Stay State Court Action and to Compel Arbitration; Petition to Stay State Court Action and to Compel Arbitration; Memorandum of Points and Authorities in Support Thereof; Declaration of Pamela G. Parsons in

Support of Petition to Stay State Court Action and to Compel Arbitration and exhibits thereto; Defendant's Memorandum of Points and Authorities in Opposition to Motion [sic] to Stay State Court Action and to Compel Arbitration; Declaration of Saint Clair Adams in Opposition to Petition to Stay State Court Action and to Compel Arbitration and exhibits thereto; and Circuit City's Reply Memorandum in Support of Petition to Stay State Court Action and to Compel Arbitration; as well as Circuit City's Notice of Motion and Motion for Rule 11 Sanctions; Memorandum of Points and Authorities in Support Thereof; Declaration of Rex Darrell Berry in Support of Motion for Rule 11 Sanctions and exhibits thereto; Defendant's Memorandum of Points and Authorities in Opposition to Motion to Impose Rule 11 Sanctions; Declaration of Angela M. Alioto in Opposition to Plaintiffs Motion to Impose Rule 11 Sanctions; and Reply Memorandum of Petitioner Circuit City Stores, Inc. in Support of Motion for Sanctions; and the parties having appeared at oral argument through their respective counsel of record; and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Circuit City's Petition to Stay State Court Action and to Compel Arbitration is GRANTED. The basis for this Order is set forth in the Court's oral opinion, a copy of which is attached as Exhibit A hereto, and is incorporated by reference. The California Superior Court action entitled "Saint Clair Adams v. Circuit City Stores. Inc., Derrick Iman; Scott Stevens, Geoff Collins and DOES 1 through 10, inclusive," Sonoma County Superior Court Case No. S-CV-217898 is hereby STAYED in its entirety pending completion of the arbitration of this dispute. All claims raised by Respondent in the Sonoma County Superior Court lawsuit Case No. S-CV-217898, are hereby compelled into arbitration pursuant to the Dispute Resolution Agreement between Respondent and Circuit City.

2. Circuit City's Motion for Rule 11 Sanctions is DENIED. The basis for this Order also is set forth in the Court's oral opinion, and is incorporated by reference.

DONE IN OPEN COURT this 29th day of April, 1998.

/S/ Charles A. Legge
United States District Court Judge

[Presented by:

DAVIS, GRIMM & PAYNE

By /S/ RB
Rex Darrell Berry, CSB#110219
Attorneys for Plaintiff Circuit City Stores, Inc.]

Exhibit A [to Opinion and Order Staying State Court Action and Compelling Arbitration]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

CIRCUIT CITY STORES, INC., A VIRGINIA CORPORATION, PETITIONER, VS. SAINT CLAIR ADAMS, A CALIFORNIA RESIDENT, RESPONDENT.	NO. C 98-0365 CAL

SAN FRANCISCO, CALIFORNIA
FRIDAY, APRIL 3, 1998

APPEARANCES:

FOR PETITIONER: DAVIS, GRIMM & PAYNE
1111 THIRD AVENUE
SUITE 1865
SEATTLE, WASHINGTON 98101
BY: REX DARRELL BERRY
ATTORNEY AT LAW

FOR RESPONDENT: LAW OFFICES OF JOSEPH L. ALIOTO AND ANGELA ALIOTO
558 SACRAMENTO STREET
4TH FLOOR
SAN FRANCISCO, CA 94111
BY: ANGELA M. ALIOTO
STEVEN L. ROBINSON
ATTORNEYS AT LAW

FRIDAY, APRIL 3 1998 9:45 A.M.

THE CLERK: CIVIL ACTION 98-0365, CIRCUIT CITY STORES, INC., VERSUS SAINT CLAIR ADAMS.

COUNSEL, YOUR APPEARANCES, PLEASE.

MS. ALIOTO: ANGELA ALIOTO FOR PLAINTIFF, YOUR HONOR.

MR. ROBINSON: STEVEN L. ROBINSON WITH THE PLAINTIFF.

MR. BERRY: GOOD MORNING, YOUR HONOR. REX BERRY ON BEHALF OF CIRCUIT CITY, THE PETITIONING PARTY.

THE COURT: ALL RIGHT. THIS IS THE PETITIONER'S MOTION TO STAY THE STATE COURT PROCEEDINGS AND TO COMPEL ARBITRATION.

I'VE GONE OVER THE MOVING AND OPPOSING PAPERS, AND DOES EITHER SIDE HAVE ANYTHING FURTHER YOU'D LIKE TO ADD?

MR. BERRY: ONLY IN RESPONSE TO WHATEVER QUESTIONS THE COURT MIGHT HAVE.

THE COURT: ALL RIGHT. I DON'T THINK IT'S NECESSARY.

COUNSEL, DO YOU WANT TO ADD ANYTHING?

MS. ALIOTO: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THIS IS THE PETITIONER'S MOTION TO COMPEL ARBITRATION AND TO STAY THE STATE COURT PROCEEDINGS PENDING THAT ARBITRATION.

THERE WAS A CIVIL ACTION FILED BY THE RESPONDENT HERE AGAINST THE PETITIONER HERE AND THREE OTHERS IN SUPERIOR COURT, AND THE ALLEGATION IS DISCRIMINATION AND

ALLEGED HARASSMENT BY THE EMPLOYER BASED ON THE PLAINTIFF'S SEXUAL ORIENTATION.

AND THEN THE PETITIONER, THE COMPANY, HAS COME TO THIS COURT AND REQUESTED A STAY OF THE STATE COURT ACTION AND AN ORDER COMPELLING THE ARBITRATION.

THE ARBITRATION ARISES FROM THE DISPUTE RESOLUTION AGREEMENT WHICH WAS SIGNED BY -- I'LL REFER TO THE RESPONDENT HERE AND THE PLAINTIFF IN THE STATE COURT CASE AS MR. ADAMS -- SIGNED BY MR. ADAMS.

THE RECORD INDICATES TO ME THAT THERE BEGAN SOME EMPLOYMENT PROBLEMS THAT ADAMS BROUGHT TO SOMEBODY'S ATTENTION IN NOVEMBER OF 1996 AND THAT HE THEN LEFT CIRCUIT CITY AS AN EMPLOYEE IN NOVEMBER OF 1996 OF COURSE COMPLAINING EFFECTIVE DISCHARGE.

HE ALSO FILED A REQUEST FOR ARBITRATION WHEN HE LEFT THAT I HAVE HERE AND I'LL REFER, TO IN MORE DETAIL IN A MOMENT. THE RECORD DOESN'T INDICATE THAT CIRCUIT CITY REPLIED TO THAT WRITTEN REQUEST FOR ARBITRATION UNTIL THE ACTION IS FILED IN STATE COURT.

NOW, THE FIRST QUESTION, OF COURSE, IS WHETHER THIS COURT HAS JURISDICTION TO BE ENTERING AN ARBITRATION ORDER; AND IT'S CLEAR THE COURT HAS TO HAVE JURISDICTION, SUBJECT MATTER JURISDICTION, OVER THE MATTER THAT'S INDEPENDENT OF THE BASIC FEDERAL ARBITRATION ACT. THAT'S 9 U.S. CODE, SECTION 1.

CIRCUIT CITY ALLEGES DIVERSITY

JURISDICTION; AND, INDEED, MR. ADAMS IS A CALIFORNIA RESIDENT AND CIRCUIT CITY IS A VIRGINIA CORPORATION WITH ITS PRINCIPAL PLACE OF BUSINESS IN VIRGINIA.

THE COMPLAINT IN STATE COURT ALSO ALLEGES THREE INDIVIDUAL DEFENDANTS AS SUPERVISORS; BUT FOR PURPOSES OF DIVERSITY AND FOR ALL PETITIONS TO COMPEL, I AM TO CONSIDER THE CITIZENSHIP SIMPLY OF THE PLAINTIFF AND THE PARTY WITH WHOM HE SIGNED THE ARBITRATION AGREEMENT, AND THAT IS CIRCUIT CITY. SO I BELIEVE THAT I HAVE SUBJECT MATTER JURISDICTION.

THERE'S NO DISPUTE THAT MR. ADAMS SIGNED THE DISPUTE RESOLUTION AGREEMENT, WHICH CONTAINS THIS ARBITRATION CLAUSE, WHEN HE WAS HIRED IN 1995, BUT HE RAISES CERTAIN ARGUMENTS AS TO WHY THE ARBITRATION REQUIREMENT SHOULD NOT BE ENFORCED.

ONE IS THAT HE DID APPARENTLY REQUEST SOME ARBITRATION IN 1996 IN NOVEMBER AND DIDN'T RECEIVE ANY REPLY TO THAT, SO HE ARGUES THAT CIRCUIT CITY HAS WAIVED IT.

HOWEVER, WHEN I LOOK AT THE ARBITRATION DEMAND, WHICH IS A LETTER OF NOVEMBER 22ND, 1996, THE REQUEST FOR ARBITRATION JUST REFERS TO AN APPEAL OF BENEFITS. IT REALLY DOES NOT MAKE ANY REFERENCE TO THE CLAIMS NOW MADE HERE; THAT IS, THAT THERE WAS SEXUAL HARASSMENT OR PERHAPS DISCRIMINATION AND HOSTILE WORK ENVIRONMENT.

SO SINCE HE DID NOT RAISE THAT ISSUE SPECIFICALLY IN HIS NOVEMBER 22ND, 1996, DEMAND FOR ARBITRATION, I DON'T

BELIEVE THAT THE COMPANY HAS WAIVED ITS RIGHT TO COMPEL ARBITRATION IN THIS CASE. ,

MR. ADAMS ALSO MAKES THE ARGUMENT THAT THE ARBITRATION AGREEMENT IS AN UNCONSCIONABLE CONTRACT OF ADHESION, BUT I BELIEVE IT'S CLEAR HERE THAT THE CONTRACT IS TO BE INTERPRETED TO BIND BOTH PARTIES, THAT IS, MR. ADAMS AND THE COMPANY, TO ARBITRATION.

THERE ARE, INDEED, SOME LIMITATIONS ON THE RECOVERY STATED IN THIS ARBITRATION AGREEMENT, BUT I DON'T BELIEVE THAT THEY AMOUNT TO THE EXTREME ONE-SIDEDNESS THAT'S REQUIRED FOR A FINDING OF UNCONSCIONABILITY AS A MATTER OF LAW, AND I'M REFERRING SPECIFICALLY TO THE GOLENIA, G-O-L-E-N-I-A CASE, DIDONATO, D-I-D-O-N-A-T-O, CASE, AND O'NEIL VERSUS HILTON.

SO IN VIEW OF THE STRONG STATE AND FEDERAL POLICY, PARTICULARLY THE FEDERAL POLICY ANNOUNCED IN THE ARBITRATION ACT, I FIND THAT THE CONTRACT IS ENFORCEABLE.

THE ARGUMENT IS MADE THAT THIS WOULD BE CONTRARY TO THE ANTI-INJUNCTION ACT. HOWEVER, I THINK IT'S CLEAR FROM THE U.S. SUPREME COURT DECISION IN MOSES COHN, THAT THE ANTI-INJUNCTION ACT DOES NOT PREVENT A FEDERAL COURT TO -- FROM ENTERTAINING A PETITION TO COMPEL ARBITRATION, AND THAT'S TRUE EVEN THOUGH THE UNDERLYING SUIT -- THE UNDERLYING DISPUTE TO BE ARBITRATED IS ONE PENDING IN STATE COURT.

SO I THINK THERE IS AMPLE AUTHORITY UNDER BOTH FEDERAL AND STATE LAW FOR COMPELLING ARBITRATION EVEN --COMPELLING

ARBITRATION IN THE STATE COURT DISPUTE AND TO STAY A STATE COURT ACTION PENDING COMPLETION OF THAT ARBITRATION.

THAT'S BEEN DONE IN SEVERAL CASES. JUST TWO EXAMPLES ARE WILLIAMS & ASSOCIATES VERSUS MC MAHON AND NETWORK CINEMA AGAINST GLASSBURN, AND THEN ALSO CIRCUIT CITY AGAINST GONZALES IN THE EASTERN DISTRICT OF CALIFORNIA.

SO FOR ALL THOSE REASONS, THE MOTION TO COMPEL ARBITRATION AND TO STAY WILL BE GRANTED.

THE MOTION FOR RULE 11 SANCTIONS WILL BE DENIED. I THINK THE OPPOSITION IS IN GOOD FAITH WITH SOME LEGAL SUPPORT FOR IT; AND ALTHOUGH I'M RULING AGAINST THE RESPONDENT ON THIS MATTER, I DO NOT BELIEVE IT'S ONE WHERE RULE 11 SANCTIONS ARE CALLED FOR.

SO I WILL ASK THE PETITIONER HERE TO SUBMIT AN ORDER FOR SIGNATURE THAT GRANTS THE ARBITRATION AND STAYS THE STATE COURT PROCEEDING.

THANK YOU.

MR. BERRY: THANK YOU, YOUR HONOR.

MS. ALIOTO: ALL RIGHT. THANK YOU VERY MUCH, YOUR HONOR.

(WHEREUPON PROCEEDINGS ADJOURNED AT 9:50 A.M.),

CERTIFICATE OF REPORTER

I, JO ANN BRYCE, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

/S/ Jo Ann Bryce

JO ANN BRYCE, CSR, RPR, RMR, CRR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15992

CIRCUIT CITY STORES, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

Saint Clair ADAMS, a California resident,
Defendant-Appellant.

Argued and Submitted Oct. 4, 1999.
Decided Nov. 18, 1999.

Angela Alioto, Steven L. Robinson, Law Offices of Mayor Joseph L. Alioto & Angela Alioto, San Francisco, California, for the defendant-appellant.

Rex Darrell Berry, Davis, Grimm & Payne, Seattle, Washington, for the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; Charles A. Legge, District Judge, Presiding. D.C. No. CV-98- 00365-CAL.

Before: FLETCHER, D.W. NELSON, and BRUNETTI, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's final order compelling arbitration under the Federal Arbitration Act, 9 U.S.C.A. § 1, et seq. (West 1999) ("FAA"). We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court, however, lacked the authority, as a matter of substantive law, to compel arbitration because the Federal Arbitration Act does not apply to this case. In Craft v. Campbell Soup Co.,

177 F.3d 1083, 1094 (9th Cir.1999), we held that the FAA does not apply to labor or employment contracts.

Factual and Procedural Background

Saint Clair Adams appeals the district court's order staying the state court action and compelling arbitration. Circuit City sought mutually binding arbitration under Section 4 of the FAA in response to Adams's state court lawsuit under the California Fair Employment and Housing Act ("FEHA"). On October 23, 1995, Adams completed a six-page application to work at Circuit City Stores. On pages two and three of the application, Adams signed a document titled "Circuit City Dispute Resolution Agreement" ("DRA"). The DRA requires that employees submit all claims and disputes to mutually binding arbitration.[1] An employee cannot work at Circuit City without signing the DRA. If the employee signs the DRA and then withdraws consent within three days, the employee "will no longer be eligible for employment at Circuit City."

Standard of Review

The Ninth Circuit reviews de novo the district court's order compelling arbitration. See Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447, 1449 (9th Cir.1986). The existence of subject matter jurisdiction is a question of law reviewed de novo. See Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1153 (9th Cir.1998).

---

[1] The DRA specifies that job applicants agree to settle "all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort."

Discussion

Circuit City sought arbitration pursuant to Section 4 of the FAA and asserted jurisdiction pursuant to Section 4 and 28 U.S.C. § 1332. We recognize that the FAA is not a jurisdictional statute:

> [The FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under [§ 1331] or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.

Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In this case, we need not consider whether the district court had underlying federal question jurisdiction because the FAA is inapplicable. As a threshold matter, therefore, the district court lacked the authority under Section 4 of the FAA to compel arbitration.

We must find that the FAA is inapplicable to this case under Craft if the DRA is an employment contract. This court has defined an "employment contract" as "an agreement setting forth 'terms and conditions' of employment." Modzelewski v. Resolution Trust Corp., 14 F.3d 1374, 1376 (9th Cir.1994) (quoting Black's Law Dictionary 525 (6th ed.1990)).

We find that the arbitration agreement in this case was an employment contract notwithstanding the disclaimer in the DRA. The DRA specifically states: "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me." Furthermore, it says that "this Agreement in

no way alters the 'at-will' status of my employment." Though the DRA may not alter Adams's status as an at-will employee, the agreement was a condition precedent to his employment. The agreement was an employment contract, rendering the FAA inapplicable. See Craft, 177 F.3d at 1094. Thus, we reverse the district court's order compelling arbitration and remand to the district court for dismissal because of a lack of federal authority.

REVERSE AND REMAND.

(17)

No. 99-1379

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, applies to contracts of employment.

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This federal court action arises out of a California state court lawsuit brought by a California resident alleging state law employment discrimination claims against his employer.

Respondent Saint Clair Adams ("Mr. Adams") lives in Sonoma County, California. In November 1995, Mr. Adams accepted employment as a salesperson with petitioner Circuit City Stores, Inc. ("Circuit City") at its retail store in Santa Rosa, California. Ninth Circuit Excerpts of Record ("ER") 4, 5. As a condition of employment, Mr. Adams was required to sign an application form obligating him to submit to arbitration any employment dispute with Circuit City that might thereafter arise. Joint Appendix ("J.A.") 12-17.

In November 1997, Mr. Adams filed the underlying employment discrimination lawsuit in the Superior Court of the State of California for the County of Sonoma, against Circuit City (a Virginia corporation with retail stores throughout California and the United States) and three of his Circuit City supervisors (each California residents). ER 2-4.

Mr. Adams' First Amended Complaint alleges that each of the defendants subjected him to on-the-job harassment and retaliation based upon his sexual orientation, in violation of, *inter alia*, California's Fair Employment and Housing Act, Cal. Govt. Code §12900 *et seq.*, and state common law prohibitions against constructive discharge and intentional infliction of emotional distress. ER 4, 14-26. Mr. Adams' Complaint also includes a declaratory relief claim, challenging the enforceability of the pre-dispute arbitration provision that Mr. Adams, like all Circuit City employees, was required to sign as a condition of his employment. Ninth Circuit Supplemental Excerpts of Record ("SER") 1-30; ER

44-48. Mr. Adams' complaint does not allege any federal claims.[1]

In January 1998, Circuit City filed a petition in the United States District Court for the Northern District of California to enjoin Mr. Adams' state court action and to compel arbitration of Mr. Adams' claims. Circuit City invoked that court's diversity jurisdiction and the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*

Mr. Adams opposed Circuit City's petition on the ground, *inter alia*, that Circuit City's arbitration provision was an unconscionable contract of adhesion under California law. Mr. Adams asserted that the arbitration provision lacked mutuality, because it required employees to arbitrate all of their employment-related claims against Circuit City without imposing a corresponding obligation upon Circuit City to arbitrate any of its employment-related claims against the employees. J.A. 12-14, 21-23. Mr. Adams also challenged as unconscionable Circuit City's dispute resolution procedures, which: 1) placed a cap on the amount of front pay or punitive damages an arbitrator could award (J.A. 35-36); 2) imposed a one-year statute of limitations on all claims, including claims with longer limitations periods under California law (J.A. 13, 23); 3) obligated employees to pay half the cost of arbitration, including arbitrator fees and expenses, subject to cost-shifting only at the arbitrator's discretion (J.A. 33-34); 4) vested complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee, even on statutory discrimination claims (J.A. 34-35); and 5) did not require the arbitrator to provide findings or reasoning to support the arbitration award (J.A. 32).

[1] Petitioner refers in its Statement of Facts to an Arbitration Request Form signed by Mr. Adams after he filed his state court lawsuit. Pet. Br. 5. Mr. Adams represented to the district court that he signed that form as a protective measure to comply with the statute of limitations. Petitioner does not contend that Mr. Adams thereby waived any rights.

The district court rejected Mr. Adams' challenges, relying upon "the strong state and federal [pro-arbitration] policy, particularly the federal policy announced in the [Federal] Arbitration Act," and concluding that Circuit City's mandatory pre-dispute arbitration procedures do not "amount to the extreme one-sidedness that's required for a finding of unconscionability as a matter of law." J.A. 50. The district court thereupon enjoined Mr. Adams' state court action and compelled arbitration. J.A. 43-45.

The Ninth Circuit reversed. Relying on *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (Opp. App. 1a-27a), and finding that Mr. Adams' employment application agreement with Circuit City constituted a "contract[] of employment" within the meaning of the FAA §1 "contracts of employment" exclusion, the Court of Appeals held that Mr. Adams' arbitration agreement was not covered by the FAA. J.A. 53-56. The Ninth Circuit directed the district court to dismiss Circuit City's petition, allowing Mr. Adams' state law discrimination suit to proceed in the California state court in which it had been filed. J.A. 56.

This Court granted Circuit City's Petition for Writ of Certiorari, limiting the grant to the first Question Presented – to what extent, if at all, does the FAA applies to contracts of employment? That question was reserved in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), with two dissenting Justices reaching the issue and concluding that Congress did not intend the FAA to cover *any* workers' contracts of employment. *Id.* at 36-43 (Stevens, J., with Marshall, J., dissenting).[2]

[2] Although petitioner asserts that it "has not waived" its argument that Mr. Adams' signed employment application is *not* a "contract of employment" within the meaning of the FAA (Pet. Br. 7 n.3), this Court denied *certiorari* on petitioner's second Question Presented. This case thus proceeds on the premise that the Ninth Circuit correctly ruled that the parties' agreement – a contract between an employer and employee that

SUMMARY OF ARGUMENT

Congress enacted the FAA in 1925 to make agreements to arbitrate commercial disputes enforceable in federal court. When labor objected to the FAA bill as introduced because it might reach arbitration provisions in worker contracts of employment, the bill's principal proponents responded that "[i]t is not intended that this shall be an act referring to labor disputes at all," and Congress promptly adopted the suggestion that explicit language be inserted to exclude "workers' contracts" from the scope of the Act. *See infra* at pp. 13-15. FAA §1, as enacted, thus excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the Act's coverage. Although FAA §2's coverage provision appeared not to include contracts of employment at all (because they were not "contracts *evidencing a transaction involving commerce*"), any uncertainty in this regard was resolved by §1's explicit exclusion for contracts of employment.

In 1925, the §1 statutory phrase "workers engaged in . . . commerce" was a well-established term of Commerce Clause art that encompassed *all* workers within the commerce power.

---

applied throughout the employment relationship and created a mechanism for adjudicating disputes over the interpretation and enforceability of the terms and conditions of employment (J.A. 12-17) – *is* an FAA "contract of employment." *See* Opp. Cert. 4-6. Petitioner warns that if such agreements are deemed "contracts of employment" for purposes of the FAA §1 exclusion, employers will circumvent state law regulation of their employment arbitration agreements by the "artifice" of having "industry associations or other third party entities" act as "straw men" to impose such agreements on the employers' workers. Pet. Br. 37. Whether such a subterfuge would be permitted is not at issue here, although petitioner's warning underscores the enormous disparity in bargaining power between employers and their prospective employees – a disparity that was brought to Congress' attention in 1925 as a basis for excluding workers' "contracts of employment" from the FAA. *See infra* at pp. 12-13.

FAA §1 thus excluded from the Act the contracts of employment of every worker who might have been covered by the Act. There were no workers whose contracts of employment could be said to be "contracts evidencing a transaction involving commerce" under the FAA §2 coverage provision who would not have been excluded as "workers engaged in . . . commerce" under the FAA § 1 exclusion — the statutory phrases "engaged in commerce" and "involving commerce" both reached to the full extent of the commerce power. Indeed, dictionaries of the period define "involving" and "engaged in" as synonyms. Considerations of sound grammar, rather than any intent to limit the scope of FAA §1's exclusion in relation to FAA §2's coverage, explain why Congress used different words in the two sections; in common parlance, "workers" could not be said to be "involving" commerce any more than "transactions" could be said to be "engaged in" commerce.

Application of the canons of *ejusdem generis* and *noscitur a sociis* to FAA §1's text does not, as petitioner Circuit City claims, justify transformation of the broad §1 exclusion of "any other class of workers engaged in foreign or interstate commerce" into the far more limited exclusion of "workers directly engaged in transportation of goods in commerce." It was well-settled in 1925 that "commerce" includes more than "transportation." If Congress had meant to exclude only those workers "engaged in . . . *transportation*," §1 would have said so, using other statutes of the period as its model. Moreover, §1 explicitly refers to "*any other* class of workers," an expansive term that precludes petitioner's narrow reading of the §1 text. And, even if petitioner's statutory construction argument had some basis in §1's text or in the statutory interpretation canons, that argument would still have to be rejected because it attributes to Congress an intent that makes no sense. Congress would not have *excluded* from the FAA the contracts of those workers most clearly within the 1925 commerce power, while *including* the

contracts of workers as to whom its commerce power was most doubtful.

None of petitioner's pro-arbitration policy arguments support a different conclusion, because none are relevant to what the FAA Congress intended. The only relevant policy in this case is federalism. If the FAA applies to contracts of employment, that federal law would preempt the States from exercising their traditional police powers over the employment relationship. As this Court has emphasized, federal statutes are not to be interpreted to displace traditional State powers unless Congress' preemptive intent is "absolutely clear." Given the language, background, and structure of the FAA, that standard of certainty is not be met here.

ARGUMENT

This statutory interpretation case turns on two provisions of the Federal Arbitration Act. The FAA's coverage provision (§2), enacted in 1925 and never amended, states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C. §2]

The FAA's definition of "commerce"/exclusion of "contracts of employment" provision (§1), enacted at the same time and also never amended, defines "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation," and then states:

> . . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. [9 U.S.C. §1]

These provisions make manifest Congress' intent *not* to have the FAA apply to *any* "contracts of employment." In the ordinary meaning that would have been given to §2 in 1925, a "contract of employment" was neither a "maritime transaction" nor a "contract evidencing a transaction involving commerce." And, to the extent §2's language was ambiguous, and thus open to a construction that included "contracts of employment," the §1 "contracts of employment" exclusion cured such ambiguity by explicitly excluding from the potential coverage of §2 all such contracts as a class. Considered in the context of pre-1925 Commerce Clause jurisprudence, Congress' exclusion of the employment contracts of "any other class of workers engaged in foreign or interstate commerce" signified its intent to exclude all "contracts of employment" within Congress' "commerce power to the full" – to borrow the language and logic of *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). As the recognized scope of the commerce power has expanded, so has both the scope of the §2 coverage provision *and* the scope of the §1 exclusion.

The drafters and principal proponents of the FAA bill made clear that the legislation was a "commercial arbitration act," that "it was not the intention of this bill to make an industrial arbitration in any sense," and that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating 'but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce.'" *See infra at* pp. 13-15. Labor in fact *did* "object[] . . . to the inclusion of workers' contracts" in the FAA. And, to meet that objection, "the law's scheme" *was*

amended by Congress through the adoption of the proposed "contracts of employment" exclusion.

Against that background, the only rational reading of FAA §1 and §2 is that Congress drafted §1 and §2 *in pari materia* to ensure that the FAA would exclude all contracts of employment from coverage, both then and in the future. The §1 exclusion responded to labor's concerns about the disparity in negotiating power between employers and workers. No one suggested that this imbalance existed only in certain sectors of the economy within Congress' commerce power but not in others, or that labor's concerns could be addressed by an FAA exclusion of only some classes of workers.

To be sure, petitioner Circuit City urges a quite different interpretation of FAA §1 and §2. Petitioner begins by asserting that §2's "contract evidencing a transaction involving commerce" language is general enough to include "contracts of employment." Petitioner then argues that in 1925, "involving commerce" was a broad term of Commerce Clause art invoking the full commerce power and that "engaged in commerce" was a narrow term of art. It follows, claims petitioner, that by reason of this difference and of the application of the canons of *ejusdem generis* and *noscitur a sociis* to the §1 "contracts of employment" exclusion provision, Congress must have intended to exclude from the Act only a subclass of workers within its commerce power – seamen, railroad employees, and those whom petitioner describes as workers "directly engaged in the interstate transportation of goods in commerce." But petitioner's reading of the FAA, as we show below, is fatally flawed in each of its particulars and as a whole.

• Petitioner's premise that "involving commerce" and "engaged in foreign and interstate commerce" were critically different Commerce Clause "terms of art" in 1925 – the first

broad and the second narrow – is historically insupportable. Congress had never used (and has not since used) the Commerce Clause phrase "involving commerce" except in the FAA. And, the phrase persons "engaged in commerce" was the common phrase that Congress used at that time to invoke the *full* extent of its commerce power.

• Petitioner misuses the canons of *ejusdem generis* and *noscitur a sociis* to work an impermissible transformation of the statutory phrase "any other class of workers engaged in foreign or interstate *commerce*" into the quite different phrase "any other class of workers engaged in *transportation of goods* in foreign or interstate commerce." The term "commerce" is specifically defined in the very sentence of the FAA containing the statutory phrase that petitioner seeks to transform, and neither that definition nor common usage limits "commerce" to "the transportation of goods." Moreover, Congress in 1925 had considerable experience enacting statutes limited to the transportation industry or transportation industry workers only, and thus had models readily available if that was FAA §1's intended limited scope. And, neither of petitioner's canons provide a basis for limiting Congress' expansive phrase "*any other* class of workers engaged in . . . commerce." As this Court has recognized, Congress uses the phrase "any other" to delineate a broad category defined in its own terms, not a category limited by narrow reference to surrounding statutory terms.

• Petitioner does not offer any explanation for, or response to, the statements by the drafters and principal proponents of the FAA that: the Act was enacted to facilitate commercial arbitration, not employment arbitration; and that labor's objection to FAA coverage of the latter agreements would be fully resolved – as indeed that objection was – by excluding workers' contracts of employment as a class from the FAA's coverage.

• Finally, petitioner's interpretation of FAA §1 and §2 renders the Act entirely irrational with respect to which workers' employment contracts are covered. Petitioner attributes to Congress the supremely unlikely intention of regulating under the FAA, and thereby displacing state lawmaking authority to regulate, workers at the fringes (at best) of Congress' commerce power (those workers not "engaged in" commerce but nonetheless having contracts of employment "evidencing transactions involving commerce"), while excluding from the FAA, and thereby preserving state lawmaking authority over, the transportation industry workers who are at the core of Congress' commerce power. Congress, of course, never stated any such intention or offered any rationale for this purported distinction between transportation workers and other workers. Nor does petitioner suggest any cogent *post hoc* explanation for why Congress may have formed such an extraordinary intention or drawn such an inexplicable distinction. The entire weight of petitioner's argument for FAA coverage here, and for the corresponding preemption of California law, thus rests upon the proposition that Congress inverted basic federalism principles for no discernible substantive purpose.

I. The Legislative Background To The FAA's Coverage Provision And "Contracts Of Employment" Exclusion

Congress enacted the FAA 75 years ago, when the scope of the Commerce Clause power to regulate "foreign and interstate commerce" was narrow and the current set of conventions for delineating the Commerce Clause scope of congressional enactments had not been established. It therefore facilitates an understanding of the FAA's Commerce Clause provisions to place the FAA in its historical context at the outset – by retracing the steps taken in drafting and amending the federal arbitration bill – and then to turn to the statutory text and to the dispositive

question of the proper interpretation of that text as the enacting Congress would have understood it.[3]

Throughout the early part of the 20th century, the common law rule in many states prohibited judicial enforcement of pre-dispute arbitration agreements. This common law rule, which left the business community no enforceable means of settling commercial disputes other than through litigation, became the subject of growing criticism throughout the commercial bar. In 1920, the American Bar Association ("ABA") therefore directed its Committee on Commerce, Trade and Commercial Law to prepare a report and to draft legislation to promote "the further extension of the principle of commercial arbitration." Report of the 43rd Annual Meeting of the ABA, 45 ABA Rep. 75 (1920).

The result of the ABA Committee's efforts was the proposal for federal commercial arbitration legislation that became the FAA. On December 20, 1922, that federal arbitration bill, drafted by the ABA Committee in consultation with Secretary of Commerce Herbert Hoover, was simultaneously introduced by Senator Sterling in the Senate (S. 4214) and by Representative Mills in the House (H.R. 13522).[4]

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[3] *See e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979) (statutory language must be construed in its historical context as the enacting Congress would have understood it); *MCI Telecommunications v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228 (1994).

[4] Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary (hereinafter "Hearing"), 67th Cong., 4th Sess. 2 (1923); 64 Cong. Rec. 732, 797 (1922); 47 ABA Rep. 293-94 (1922). A history of the ABA's efforts is set forth at 50 ABA Rep. 356-62 (1925) and in Ian MacNeil, American Arbitration Law: Reformation, Nationalization, Internationalization (1992) ("MacNeil"); see also Hearing at 2-3. The business community's perceived need for less costly and time-consuming means of resolving commercial disputes,

As introduced, §2 of the FAA bill made valid and enforceable "written provisions for arbitration" in "any contract or maritime transaction or transaction involving commerce," and §1 defined "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Shortly after the bill's introduction, it came to the attention of Andrew Furuseth, president of the International Seamen's Union of America. Mr. Furuseth strongly objected to the bill's potential "compulsory labor" impact on "the seaman . . . the railroadman . . . [and] sundry other workers in 'interstate and Foreign Commerce,'" explaining:

> [T]he bill provides for the re-introduction of *forced or compulsory labor* if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the *seaman* and the hunger of the wife and children *of the railroadman* will surely tempt them to sign *and so with sundry other workers in "interstate and Foreign Commerce."* [Proceedings of the 26th Annual Convention of the International Seamen's Union

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and the commercial orientation of the proposed legislation, are discussed throughout the ABA Reports of the period and the FAA's legislative history, as well as in the contemporary accounts of its drafters. See MacNeil 29-31, 31-42, 83-121 (1992); Paul H. Carrington and Paul H. Haagen, Contract and Jurisdiction, 1996 Supreme Court Review 331, 341 (1997); *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting); The United States Arbitration Law and Its Application, 11 ABA Journal 153-56 (March 1925); 48 ABA Rep. 290 (1923); 50 ABA Rep. 359-60 (1925).

> of America 203-05 (1923) (Appendix to Convention Proceedings) (emphasis supplied)][5]

Labor's objections were promptly heard by Congress and promptly addressed. At the January 31, 1923 Senate Judiciary Committee hearing on the proposed FAA, Mr. W.H.H. Piatt, Chair of the ABA Committee that had drafted the bill, told Congress:

> Mr. Piatt: . . . [T]here is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head or whatever he is of that part of the labor union that has to do with the ocean – the seamen –
>
> Sen. Sterling: Mr. Furuseth
>
> Mr. Piatt: Yes, some such name as that. He has objected to it and criticized it on the ground that the bill in its present form would affect, in fact, compel arbitration of the matters in agreement between the stevedores and their employers. Now *it was not the intention of this bill to make an industrial arbitration in any sense*, and so I suggest that insofar as the committee is concerned, *if your honorable committee should feel*

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[5] *See also* Proceedings of the 27th Annual Convention of the International Seamen's Union of America 100 (1924); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. Lab. L. 282. 284 (1996) ("Finkin I"). The American Federation of Labor ("AFL") expressed similar objections. *See* Proceedings of the 45th Annual Convention of the AFL 52 (1925). And, labor was not alone in questioning the voluntariness of arbitration agreements in employment contracts. *See, e.g.*, Hearing at 9 (Senator Walsh: "The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all . . . . It is the same with a good many contracts of employment. A man says, 'There are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all").

> *that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this. [Hearing at 9 (emphasis supplied).][6]

In a letter to Senator Sterling also dated January 31, 1923 (reprinted in the Committee Hearing record in both 1923 and 1924), Secretary of Commerce Hoover made the almost identical point made by Mr. Piatt, and offered an almost identical suggestion, in the exact language that became the FAA §1 "contracts of employment" exclusion:

> *I have been, as you may know, very strongly impressed with the urgent need of a Federal commercial arbitration act.* The American Bar Association has now joined hands with the business men of this country to the same effect and unanimously approved, at its convention in San Francisco last August, a draft of a law prepared by its committee on commerce, trade, and commercial law and approved of by a large number of associations of business men. It was introduced in the Senate by you as S. 4214 and in the House of Representatives by Congressman Mills as H.R. 13522.

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[6] Although one of petitioner's *amici curiae* read Mr. Piatt's reference to "labor disputes" as limited to collective bargaining disputes, the meaning was broader. In fact, the contracts to which Mr. Furuseth was referring, called "shipping articles," were individual contracts of hire of individual seamen. *See* Proceedings of the 24th Annual Convention of the International Seamen's Union of America 27-28 (1921). By signing such articles, the individual seaman bound himself to serve on the voyage described in the articles. *Id.* at 88; Finkin I, 17 Berkeley J. Emp. Lab. L. at 287, 292-93; *see also* 29 U.S.C. §113 ("labor dispute" encompasses disagreements over individual contracts of employment).

> The clogging of our courts is such that the delays amount to a virtual denial of justice. I append an excerpt of the American Bar Association report which would seem to support that statement. I believe the emergency exists for prompt action and I sincerely hope that this Congress may be able to relieve the serious situation.
>
> *If objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating "but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce."*
>
> If the bill proves to have some defects (and we know most legislative measures do), it might well, by reason of the emergency, be passed and amended later in the light of further experience. . . . [Hearing at 14 (emphasis supplied)].

Secretary Hoover's proposed exclusionary language was added to the FAA bill by the Senate Committee as an amendment to §1 of the bill.

The federal arbitration bill was not finally acted upon in the 1922-23 session of Congress. The bill was therefore reintroduced in the next session in December 1923, in both the House and Senate, this time with Secretary Hoover's §1 "contracts of employment" exclusion language. *See Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcomm. of the Comm. on the Judiciary* (hereafter "Joint Hearing"), 68th Cong., 1st Sess. 2 (1924). Thereafter, in the Senate Committee, an additional amendment was made to the §2 coverage section (which had originally referred to a written arbitration provision "in any contract or maritime transaction or transaction involving commerce") by substituting for the original the current phrase, "in any maritime transaction or a contract *evidencing a transaction* involving commerce," thereby clarifying that the bill only reached "contracts

evidencing a transaction involving commerce." *See* S. 4214, 67th Cong., 4th Sess. §2 (1922); S. 1005, 68th Cong., 1st Sess. (1923); H.R. 646, 68th Cong., 1st Sess. (1924); S. Rep. 68-536, 68th Cong., 1st Sess. (1924).

The reintroduced bill continued to be presented as commercial arbitration legislation. Page after page of the printed record of the Joint Hearing emphasized the benefits of commercial arbitration and the need for the bill to secure those benefits. On the floor of Congress, the sponsors of the legislation repeatedly pointed to the bill's commercial character and to the benefits for merchants of voluntary arbitration agreements. Representative Graham, Chair of the House Committee on the Judiciary, stated:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in *commercial* contracts and admiralty contracts – an agreement to arbitrate, when *voluntarily* placed in the document by the parties to it. . . . .
>
> It creates no new legislation; grants no new rights, except a remedy to enforce an agreement in *commercial* contracts and in admiralty contracts. [65 Cong. Rec. 1931 (Feb. 5, 1924) (emphasis supplied).]

Similarly, Representative Mills of New York, who had introduced the bill in the House, said in response to a request for an explanation of its provisions:

> This bill provides that where there are *commercial* contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract. [65 Cong. Rec. 11080 (June 6, 1924) (emphasis supplied).]

In short, the sponsors of the FAA and the members of Congress who spoke and voted for its passage stated that it was a commercial arbitration bill to deal with disputes arising out of commercial transactions: "The farmer who will sell his carload of potatoes, from Wyoming, to the dealer in the State of New Jersey, for instance." Joint Hearing at 7. The

legislative history does not contain a single reference suggesting that the FAA provided for employment arbitration or covered any worker contracts of employment. Nor did labor voice any objection to the FAA bill as amended to include the §1 "contracts of employment" exclusion. *See* Joint Hearing at 24 (noting absence of objectors); H. Rep. 68-96, 68th Cong. 1st Sess. 2 (1924) (same).

II. The Language of FAA §1 and §2 Manifests Congress' Intent to Exclude All Contracts Of Employment From the Act's Coverage

As we have seen, Mr. Piatt, Chair of the ABA Committee that drafted the FAA bill, averred that "it was not the intention of this bill to make an industrial arbitration in any sense," and Secretary Hoover, who participated in the drafting effort, added that, "If objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by" adding the "contracts of employment" exclusion language that was then added to §1 of the bill and enacted into law. We turn now to the text of the FAA §2 coverage provision and the §1 exclusion provision, which make manifest that the FAA does not cover workers' contracts of employment as a class.

A. In 1925, Contracts of Employment Did Not in Common Parlance "Evidence a Transaction Involving Commerce"

The FAA §2 coverage provision is phrased in unusual language. Rather than straightforwardly providing for the coverage of "written [arbitration] provisions" in "maritime contracts and other contracts involving commerce," §2 as amended and then enacted covers written arbitration provisions "in any maritime *transaction* or a contract *evidencing a transaction* involving commerce." In other words, §2 does not cover "contracts . . . involving commerce" as a class; only those "evidencing a transaction involving commerce" as a class.

Standing alone, §2's text thus raises the threshold question of whether a contract of employment would fairly and properly have been considered either a "marine *transaction*" or a "contract evidencing a *transaction* involving commerce" in 1925. In *Craft v. Campbell Soup Co.*, *supra*, the Ninth Circuit answered that question "no," after looking to the ordinary and accepted meaning in 1925 of the FAA's undefined terms "marine transaction" and "contract evidencing a transaction":

> As pertinent, when Congress passed the FAA in 1925, the term "transaction" commonly meant "[a] business deal; an act involving buying and selling." *Webster's Int'l Dictionary* 2688 (2d ed. unabridged 1939). *See also The Century Dictionary and Cyclopedia* 6426 (revised and enlarged ed. 1911) ("1. The management or settlement of an affair; a doing or performing: as, the *transaction* of business. 2. A completed or settled matter or item of business . . . ."). An employment relationship, however, is not commonly referred to as a "business deal" or as "an act involving buying and selling." Instead, the connotation of the phrase "transaction involving commerce" – as Congress would have understood it in 1925 – was of a commercial deal or merchant's sale. Therefore, the coverage section of the FAA, § 2, appears not to encompass employment contracts at all. *See* Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 599 (1954) ("It is hard enough to think of any collective bargaining agreement or employment contract as evidence of a transaction involving commerce.") (internal quotation marks omitted); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469, 557 (1993) ("[T]he FAA's reference to 'transaction involving commerce' might not have been understood in 1924 as including employment contracts."). [177 F.3d at 1085]

Neither petitioner Circuit City nor any of its *amici curiae* provide anything of substance to support a contrary reading of "maritime transaction" or "contract evidencing a transaction involving commerce." The Texas Employment Law Council does put forward the suggestion that §2 by its terms applies to contracts of employment because such contracts "evidence a transaction" comprising the "buying and selling of labor." TELC Br. 4. But, that reading both suggests an uncommon understanding of the term "transaction" and ignores that Congress by 1925 had declared that "[t]he labor of a human being is not a commodity or article of commerce." *See* Clayton Act, ch. 323, §6, 38 Stat. 731 (1914), 15 U.S.C. §17.[7]

B. Congress in FAA §1 Excluded From the Act All Contracts of Employment That Could Have Been Covered Through FAA §2

Any suggestion that FAA §2's general language was intended to encompass workers' employment contracts was put to rest when Congress adopted Secretary Hoover's amendment to FAA §1, stating: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

This language, at a minimum, eliminates from the potential reach of the Act all contracts of employment of seamen as a class and all such contracts of railroad employees as a class.

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[7] Petitioner would have it that in *Gilmer* this Court implicitly held that the employee contract there "evidenced a transaction involving commerce." Pet. Br. 37. But the question whether FAA §2 applies to contracts of employment was not raised in *Gilmer*, as the contract there was not a "contract of employment" between employer and employee, but (as the *Gilmer* Court emphasized) a registration statement between a broker and a national securities exchange which allowed the broker to sell securities in interstate commerce through interstate means of communication.

That much is beyond question, regardless of how FAA §2's "contract evidencing a transaction" language is construed.

The only point now in dispute is whether the final phrase of the §1 exclusion further eliminates from the potential reach of the FAA the employment contracts of all other workers within Congress' commerce power as a class, or only the contracts of the limited subclass of workers who transport goods in interstate commerce.

1. The FAA was drafted against the background of this Court's Commerce Clause decisions, which held that Congress had the commerce power to enact federal legislation regulating workers (and other persons) "engaged in" interstate commerce *and only such workers* (and other persons). In the face of those decisions, Congress' use of the common statutory term "workers engaged in . . . commerce" in §1 expressed its intent to exclude from the FAA's regulatory ambit the full class of workers within its 1925 commerce power. By excluding all workers "engaged in" interstate and foreign commerce, the FAA Congress renounced any intent to exercise its constitutionally-permissible regulatory authority over workers employment contracts.

(a) Prior to the enactment of the FAA, this Court had repeatedly held that Congress' commerce power was limited to persons directly in the "channels" of interstate and foreign commerce (*e.g.*, transportation and communication) or whose endeavors were so closely related to the channels of commerce "as to be practically a part of it." *Shanks v. Delaware, L. & W. R. Co.*, 239 U.S. 556, 558 (1916). An electric lineman working at a powerhouse supplying current to interstate trolley cars was within the commerce power (*Southern Pacific Co. v. Indus. Accident Comm.*, 251 U.S. 259, 262-63 (1920)), as was an iron worker repairing a bridge over which interstate railroads traveled (*Pedersen v. Delaware, L & W R. Co.*, 229 U.S. 146, 152-53 (1912)). But

workers who performed work at any remove from the channels of commerce, such as workers who produced goods for interstate shipment and use, were beyond the Commerce Clause's scope. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), for example, this Court struck down a child labor law that regulated the employment relationships of workers who produced goods shipped in interstate commerce, explaining that "[t]he making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof." *Id.* at 272.

In its early 20th century Commerce Clause cases, moreover, this Court used the phrase persons "engaged in commerce" to describe the class of persons constitutionally subject to the commerce power, as distinct from the class of persons outside the commerce power whom Congress could not constitutionally subject to Commerce Clause regulatory statutes. *See, e.g, Second Employers Liability Cases* (*Mondou v. New York, N.H. & H. R. Co.*), 223 U.S. 1, 48-49 (1912) ("Congress, in the exertion of its power in interstate commerce, may regulate the relations of common carriers by railroad, and their employees, while both are *engaged in* such commerce, subject always to the . . . qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and employees are engaged").[8]

Against that jurisprudential background, Congress by 1925 was accustomed to invoking its full commerce power through the statutory term persons "engaged in commerce." For example, the 1903 version of the Federal Employers' Liability Act, ch. 976, 32 Stat. 943 (1903), applied to "every common carrier *engaged in* [interstate] trade or commerce."

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[8] *See also id.* at 46-47; *First Employers Liability Cases*, 207 U.S. 463, 501 (1907); *Alaska S.S. Co. v. McHugh*, 268 U.S. 23, 27 (1925).

(Emphasis supplied). The Safety Appliance Act, ch. 196, §1, 27 Stat. 531 (1893), referred to common carriers "*engaged in* interstate commerce by railroad." (Emphasis supplied). And, several provisions of the Clayton Act used the phrase "*engaged in*" to identify classes of persons and companies covered by the Act. *See, e.g.*, Clayton Act, ch. 323, §2, 38 Stat. 730 (1914) ("any person engaged in commerce . . ."); *id.* §7, 38 Stat. 731 ("No corporation engaged in commerce shall acquire. . ."); *id.*, §10, 38 Stat. 734 ("No common carrier engaged in commerce shall have any dealings in securities . . .").

The FAA §1 exclusion is of a piece with those statutes. Because the term "engaged in commerce" was understood in 1925 to state the full reach of the commerce power with regard to workers, Congress' use of that phrase in §1 shows its intent to exclude all workers' employment contracts that it could constitutionally reach. *See* Cox, *supra*, 67 Harv. L. Rev. at 598.

(b) Petitioner Circuit City responds that the statutory phrase "engaged in . . . commerce" was used in the amended Federal Employers' Liability Act ("FELA") to signify *less* than the full commerce power. Pet. Br. 17-18, *citing* FELA, as amended, 35 Stat. 65 (emphasis supplied). But petitioner misreads both the language of FELA and this Court's FELA Commerce Clause cases. The amended FELA Commerce Clause provisions were *not*, as petitioner asserts, "virtually identical" to FAA §1 (Pet. Br. 17); rather, the FELA provisions were distinctly different from FAA §1, and that difference was decisive in this Court's FELA cases.

The starting point is the 1906 version of FELA, which made "every common carrier *engaged in trade or commerce* . . . liable to *any* of its employees" for injuries caused by the employer's negligence, *without regard* to whether the injured employee was himself *engaged in commerce*. FELA, ch. 3073, §1, 34 Stat. 232 (1906) (emphasis supplied). This

Court held the 1906 FELA unconstitutional, because Congress did not have the Commerce Clause power to extend the Act's "all-embracing" provisions to employees who were *not* themselves engaged in commerce. *First Employers Liability Cases*, 207 U.S. at 497. This version of FELA was invalidated because it "sought to regulate the liability of interstate carriers for injuries to any employee even though his employment had no connection whatever with interstate commerce." *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 353 (1913).

In response to this Court's ruling, Congress amended FELA to cover only employers and workers engaged in commerce *and* to add a temporal limitation. The amended Act, which is the version upon which petitioner relies, applied to "every common carrier by railroad, *while* engaging in commerce between any of the several States . . .," and it made such railroad liable for negligence only to an employee "suffering injury *while* he is employed by such carrier *in* such commerce." FELA, ch. 149, §1, 35 Stat. 65 (1908) (emphasis supplied). Petitioner's FELA argument entirely ignores the temporal limitations in the amended FELA Commerce Clause provisions and their significance.

In the *Second Employers Liability Cases*, this Court upheld the constitutionality of the amended FELA after concluding that "Congress, in the exertion of its power in interstate commerce, may regulate the relations of common carriers by railroad, and their employees, *while both are engaged in such commerce* . . ." 223 U.S. at 48-49 (emphasis supplied). In subsequent cases, the Court explained that in amending FELA to make it constitutional, Congress had cut back FELA's scope further than necessary to comply with the Commerce Clause, and that Congress could have saved FELA without adding the temporal limitation – *viz*, by providing that FELA covered railroads engaged in commerce *and* their workers engaged in commerce without regard to the

job function the worker was performing at the moment of injury.[9] None of these cases, however, held that the FELA phrases "engaging in commerce" and "employed . . . in . . . commerce," absent the temporal limitation ("*while* engaging in commerce" and "*while* employed by such carrier in such commerce"), extended to less than the full extent of the commerce power.

The sum of the matter is this. At the time here in question, this Court and Congress routinely used the term, persons "engaged in commerce," to delineate the *full* class of persons within the commerce power. We know of *no* case or statute in which that phrase was taken to be an invocation of less than the full commerce power. Although the amended FELA was held to be a limited invocation of the commerce power, that was only by reason of FELA's temporal limitation to workers "suffering injury *while* engaged in [interstate] commerce." (Emphasis supplied). Nothing in FELA or this court's FELA cases comes close to showing that, as of 1925, the phrase "workers engaged in commerce" invoked less than Congress' full commerce power.

2. Because the recognized scope of the Commerce Clause in 1925 was narrower than the recognized scope of the Commerce Clause today, the question next arises whether the FAA §1 and §2 Commerce Clause provisions should be read

[9] For example, in *Illinois R.R. Co. v. Behrens*, 233 U.S. 473 (1913), the Court recognized that Congress constitutionally *could have* extended FELA to workers, like the decedent there, who performed closely related interstate and intrastate functions. But the Court concluded that Congress instead, as a statutory matter, had limited the Act beneath what the Commerce Clause permitted by adding the element of "whether the particular service being performed at the time of injury, isolatedly considered, was in interstate or intrastate commerce." *Id.* at 477. This temporal limitation, which is not present in FAA §1, is how the FELA Congress manifested its intent *not* to apply the amended Act's protections to all injuries suffered in workplace accidents by railroad workers engaged in interstate commerce. *Id.* at 478.

dynamically (as expanding with the modern Commerce Clause's scope) or statically (as preserved in the limited 1925 Commerce Clause's scope). That question is resolved by this Court's analysis in *Allied-Bruce Terminix*, which concluded, in a rationale that applies with equal force to FAA §1, that the FAA §2 coverage provision should be read dynamically.[10]

[10] Petitioner would pretermit inquiry into the FAA Congress' intent by citing two 1970's Clayton Act cases, which petitioner characterizes as holding that the statutory phrase "engaged in commerce" must always be construed as if the enacting Congress had adopted that language today, regardless of the scope of the Commerce Clause or the actual intent of Congress at the actual time of enactment. Pet. Br. 15. Petitioner misstates both cases, neither of which reached the *Allied-Bruce Terminix* issue.

In *Gulf Oil Corp. v. Copp. Paving Co.*, 419 U.S. 186 (1974), the Government argued that the Clayton Act's "engaged in commerce" language manifested Congress' intent to reach to the full extent of its commerce power because, when that Act was adopted in 1914, "the 'in commerce' language was thought to be coextensive with the reach of the Commerce Clause." 419 U.S. at 201. This Court acknowledged that "[t]his argument from the history . . . of the Clayton Act is neither without force nor without at least a measure of support," but did not decide the issue because there was no showing that the activity at issue was within the commerce power as now understood. *Id.* at 201-02. Later that Term, the Government made the same argument in *United States v. Amer. Bldg. Maint. Indus.*, 422 U.S. 271, 277 (1975), but again the Court did not reach it; this time because the Clayton Act had been amended and reenacted *in 1950*: "[W]hether or not Congress in enacting the Clayton Act in 1914 intended to exercise fully its power to regulate commerce, . . . the fact is that when section 7 [of the Clayton Act] was reenacted *in 1950*, the phrase 'engaged in commerce' had long since become a Commerce Clause term of art, indicating a limited assertion of federal jurisdiction," and Congress by deliberately choosing to preserve that language in the course of making "sweeping changes" to the Clayton Act indicated its "intent, at least in 1950, not to apply . . . the Clayton Act to the full range of corporations potentially subject to the commerce power." *Id.* at 279-82 (emphasis supplied).

Unlike Clayton Act §7, FAA §1 and §2 have never been substantively amended and reenacted. When Congress in 1947 reenacted the FAA into positive law in Title 9, codifying the Statutes At Large into the U.S. Code

In *Allied-Bruce Terminix*, the Court considered the FAA §2 term "involving commerce" – a Commerce Clause term that, unlike "engaged in commerce," had no accepted meaning in 1925 and has never been used since. 513 U.S. at 273. As the first step in its analysis, the Court determined, from the "language, background and structure" of the Act, that Congress in FAA §2 intended "to exercise [its] commerce power to the full." *Id.* at 277. That being so, the Court held in the second part of its analysis that although "[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be so," the scope of the §2 Commerce Clause provision must be read as "expand[ing] along with the expansion of the Commerce Clause itself." *Id.* at 273-77.

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without any change in language, that reenactment was not substantive but part of a series of housekeeping bills to "enact into positive law all of the titles of the United States Code." H.R. Rep. No. 80-255 1 (1947). The House Judiciary Committee thus explained: "No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill." *See also* 93 Cong. Rec. 5029, 5043 (1947) (remarks of Rep. Robison) ("This bill makes no change in existing law"). This Court has properly rejected efforts to squeeze substantive significance from such a recodification. *See Fourco Glass Co. v. Transamerica Products Corp.*, 353 U.S. 222, 227-28 (1957). Just as Congress' codification of the FAA cannot be made into a substantive reenactment, that codification of the Act without amendment cannot be made into congressional acquiescence in petitioner's proffered construction of FAA §1. Indeed, in 1947, the *only* reported appellate decision on the issue held, contrary to petitioner's position, that the FAA does *not* cover employment contracts at all. *See Gatliff Coal. Co. v. Cox*, 142 F.2d 876, 882 (6th Cir. 1944). If congressional silence in 1947 meant anything, it was that Congress *approved* the construction of §1 that excluded all contracts of employment within the commerce power from the coverage of the Act.

When the FAA was enacted in 1925, the Commerce Clause scope of the §2 coverage provision and §1 exclusion provision were coterminous. The "language, background, and structure" of the Act demonstrate that *both* provisions were an "exercise [of] Congress' commerce power to the full." *Id.* at 273, 277. Thus, even if a worker's contract of employment could be considered a "contract evidencing a transaction involving commerce," the employment contract would still be excluded from the FAA by §1, because the worker would necessarily be a "worker engaged in . . . commerce." All employment contracts that *could be said to be covered* by FAA §2 therefore were *excluded* by §1.

To maintain the FAA's statutory scheme – which excludes all contracts of employment by §1 that could be said to covered by §2 – the §1 Commerce Clause provision must expand just the §2 provision expands. As the Ninth Circuit concluded in *Craft*, a contrary interpretation of the FAA, – that reads §2's Commerce Clause provision dynamically while reading §1's statically – "would require us to hold [contrary to all reason] that Congress intended to *include* some employment contracts within the scope of the FAA *prospectively*, even though it *initially excluded* all employment contracts[, and to] attribute[] to Congress the ability to foresee the New Deal's expansion of the Commerce Clause." *See* 177 F.3d at 1088 (emphasis in original).[11]

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[11] Even if petitioner were correct that the scope of the FAA §1 exclusion should be based on what the term "engaged in commerce" is deemed to signify in post-1930s statutes (without regard to what the FAA Congress intended or how §1 relates to §2 in the FAA statutory scheme), the §1 exclusion would go well beyond the exclusion of transportation-of-goods-in-commerce workers. In modern terms, the workers "en gaged in commerce" are those "within the flow of interstate commerce – the practical, economic continuity in the generation of goods and ser vices for interstate markets and their transport and distribution to

III. Circuit City's Proffered Reading Of FAA §1 Can Not Be Squared With The Statutory Text

Petitioner Circuit City would have the final phrase of the FAA §1 exclusion – "any other class of workers engaged in foreign or interstate commerce" – say something quite different from what its words say: "any other class of workers *directly* engaged *in the interstate transportation of goods* in commerce." Petitioner would effect this dramatic transformation of the statutory language through a two-part analysis – but neither part of this analysis can survive scrutiny.

1. Petitioner contends that the §2 coverage provision ("involving commerce") was a Commerce Clause term of art signifying a broader invocation of the commerce power than was signified by the §1 exclusion provision ("engaged in commerce"), and that Congress therefore must have intended to create a gap between the §2 coverage provision and the §1 exclusion provision – a gap occupied by an FAA-covered subclass of workers who were not themselves "engaged in commerce," but who nonetheless had contracts of employment "evidencing a transaction involving commerce." This contention is wrong from beginning to end.

First, "involving commerce" was *not* a Commerce Clause term of art in 1925, much less a term with an established broad meaning. The phrase "involving commerce" had never been used in a Commerce Clause provision prior to 1925, and has never been so used since. Nor is "involving commerce" defined in the FAA to have a special meaning; although the

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the consumer." *Gulf Oil Corp. v. Copp Paving Co., supra*, 419 U.S. at 195; *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). Workers like Mr. Adams, who sell goods that are manufactured in other states and countries and shipped interstate both before and after the point of sale, would therefore be *excluded*. *See, e.g.*, BNA, *The Fair Labor Standards Act*, §3.III at 105-13 (1999) (collecting cases concerning which workers are "engaged in commerce" for purposes of the FLSA, 29 U.S.C. §§206(a), 207(a)(1)).

Act defines "commerce" for all the Act's purposes, it does so without separately defining "involving commerce" or "engaged in commerce."

Second, and equally to the point, the phrase "workers engaged in commerce," as we have shown, was a common Commerce Clause term that was understood in 1925 to state the full reach of Congress' commerce power over workers. *See supra* at pp. 20-22. In the Commerce Clause jurisprudence at the time, there was no place within the scope of Congress' commerce power beyond "engaged in commerce" for "involving commerce" to have reached.

Third, in the common parlance of 1925, "involving" and "engaged" were often used as synonyms. Dictionaries of the period define "engaged" as, *e.g.*, "involved"; define "engage" as, *e.g.*, to "involve oneself" or to "become involved"; and define "involve" to include, among its usages, "to engage thoroughly."[12] Congress in FAA §2 thus used the term "involving commerce," based on its commonly understood usage, to express the same commerce power reach as the FAA §1 term of art, "engaged in commerce."

Where the terms "involving" and "engaged in" differed, then as now, was in their proper use in grammatical context – which explains why Congress used different words in FAA §1 and §2 to express the same exercise of its commerce power. Grammatically, Congress could not have used the same connective in both provisions. A "transaction" is *not* said to be "engaged in" something, yet workers *are* said to be

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[12] *See, e.g.*, Webster's First New International Dictionary (1917) (emphasis supplied) (defining "engaged" as: " . . . 4. *Involved* . . . ."; defining "engage" as: ". . . 2. To embark in a business; to take part; to employ or *involve one's self* . . . . 4. To become *involved* or entangled"; and defining "involve" as ". . . 7. To *engage* thoroughly; to occupy, employ or absorb."); Black's Law Dictionary (1933) (defining "engage" as "To employ or involve one's self . . .") .

"engaged in" something. Because "contracts evidencing a transaction involving commerce" is sound English usage – while "contracts evidencing a transaction engaged in commerce" is not – the former is what §2 says. And, because it is both customary English usage, and was the normal convention at the time, to speak of workers "engaged in commerce" rather than workers "involving commerce," the former is what §1 says. The fact that the FAA uses two terms, each in a syntactically appropriate way, can not be taken to signify a congressional intent to legislate more broadly in the §2 coverage provision than in the §1 exclusion provision and by so doing, to create a gap between the two.

2. Although petitioner Circuit City devotes much of its brief to the supposed distinction between "involving commerce" as a broad Commerce Clause term and "engaged in commerce" as a narrow term, that distinction, even if correct (and it is not), would move petitioner only a small part of the way toward its statutory interpretation goal. Demonstrating the *existence* of a gap between the Commerce Clause provisions in FAA §1 and §2 does nothing to delineate *which* workers who were not themselves "engaged in . . . commerce" under §1 would nonetheless be covered by the FAA by virtue of having contracts of employment "evidencing a transaction involving commerce" under §2.

Because petitioner's first argument could not, even if valid, explain *which* workers Congress intended the FAA to cover, petitioner goes on to its second argument, based on the twin canons of *ejusdem generis* and *noscitur a sociis* and on the guideline that where a statute has two equally plausible interpretations, courts should reject the one that would result in statutory surplusage. *See* Pet. Br. 23-23.

Canons of construction are aids to construing ambiguous statutory language, not a means "to defeat the obvious purpose of legislation" by imposing a limiting construction on language not reasonably susceptible to that limitation. *See,*

e.g., Gooch v. United States, 297 U.S. 124, 128-29 (1936); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 88-89 (1934). And, the statutory term "workers engaged in . . . *commerce*" cannot be deconstructed by the canons of construction to mean "workers engaged in *transportation of goods in commerce*."

First, "commerce" is a statutory term that is specifically defined in FAA §1 – and a term that was well understood in 1925 to include *more* than just the interstate transportation of goods. *See, e.g., Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899) ("Interstate commerce . . . includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities"). That being so, as the statutes of the time attest, where Congress intended to limit a Commerce Clause provision to the class of workers engaged in the "interstate transportation of goods in commerce," that is what Congress said. Yet, Congress in the FAA did *not* choose to define the excluded "any other class of workers" as workers "engaged in the interstate or foreign transportation of goods." Instead, the FAA Congress used the common, well-understood, and more comprehensive phrase, "workers engaged in foreign or interstate commerce."[13]

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[13] Among the many statutes of the period that Congress could have taken as a model to limit FAA §1 to transportation workers only, had that been its intent, were: Act of July 15, 1913, ch. 6, §1, 38 Stat. 103 ("The provisions of this chapter shall apply to any *common carrier or carriers . . . engaged in the transportation of passengers or property* wholly by railroad, or partly by railroad and partly by water . . ."); Hours of Service Act, ch. 2939, 34 Stat. 1415, 1415-17 (1907) (applying to "common carrier[s] . . . and [their] employees, *engaged in the transportation of passengers or property by railroad*" in interstate commerce"); Interstate Commerce Act, ch. 104, §1, 24 Stat. 379 (1887) (applying "to any *common carrier or carriers engaged in the transportation of passengers or property* wholly by railroad; or partly by water when both are used, under a common control, management, or arrangement, for a continuous

Second, petitioner's argument that FAA §1 excludes transportation-of-goods-in-commerce workers only cannot be squared with the plain language of a crucial phrase in FAA §1 – "any other class of workers," which is a term of breadth, not limitation. When Congress uses the phrase "any other" to describe a residual category, it does so to indicate that the category (here, "any other class of workers engaged in . . . commerce") stands on its own, unlimited by reference to prior statutory terms.

In *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), for example, this Court rejected efforts to apply *ejusdem generis* to the phrase "any other final action" in §307(b)(1) of the Clean Air Act Amendments of 1997, which provides for direct review of actions by the EPA Administrator under specifically enumerated provisions of the Act *and* for such review of "*any other final action* of the Administrator under this Act . . . ." 42 U.S.C. §7607 (b)(1) (emphasis supplied). Petitioner in *Harrison* made the *ejusdem generis* argument that the term "any other final action" must be read as limited

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carriage or shipment . . ."); Safety Appliance Act, ch. 196, §1, 27 Stat. 531 (1893) (applying to every common carrier "*engaged in interstate commerce by railroad*"); *id.* §2, §3, 27 Stat. 531 (1893); *id.* §6, 29 Stat. 85 (1896) ("Any *common carrier engaged in interstate commerce by railroad* . . ."); *id.* ch. 225, §1, 35 Stat. 476 (1908) ("It shall be unlawful for any *common carrier engaged in interstate or foreign commerce by railroad* . . ."); FELA, ch. 149, §§1, 2, 35 Stat. 65 (1908) ("Every common carrier by railroad . . ."); Erdman Act, ch. 370, §1, 30 Stat. 424 (1898) ("any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, . . . *engaged in the transportation of passengers or property* wholly by railroad, or partly by railroad and partly by water," and defining employees to "include all persons *actually engaged in any capacity in train operation or train service* of any description"); Act of March 4, 1921, ch. 172, §233, 41 Stat. 1445 (ICC shall formulate regulations for transportation of explosives "which shall be binding upon all *common carriers engaged in interstate or foreign commerce* which transport explosives or other dangerous articles . . .").

to only final actions like the specifically enumerated actions. The Court rejected the argument, concluding that the "fundamental" problem with applying *ejusdem generis* to the statutory text was the modifier "any": "[T]he phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely *any other* final action." *Id.* at 588-89 (emphasis in original).

Similarly, in *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923), this Court rejected a proposed application of the *noscitur a sociis* canon to a statute granting the President power "[t]o modify, suspend, cancel or requisition any existing or future contract." While acknowledging that the term "requisition" is used in connection with private contracts rather than government contracts, the Court concluded that because Congress used the expansive phrase "any," Congress did not mean to limit the statutory power to private contracts. As the Court stated, "*any* existing or future contract,' read with literal exactness, includes all contracts, whether private or governmental." *Id.* at 519-22.

So too in FAA §1, if the legislative intent had been to exclude only a limited *subclass* of the class of workers engaged in commerce, the FAA Congress would not have expansively and unambiguously described the residual class as "any other class of workers engaged in commerce."

Third, petitioner's *ejusdem generis* argument depends upon the false premise that the *sole* characteristic shared by "seamen" and "railroad employees" is that both classes of workers transport goods in commerce. In truth, those two classes of workers share several more relevant common characteristics, not the least of which is that in 1925, seamen and railroad employees were the only private-sector classes of

workers whom Congress *could* regulate under the Commerce Clause that Congress *had* previously regulated.[14]

It is far more likely that the FAA Congress included the references in §1 to "seamen" and "railroad employees" for emphasis and to provide the two preeminant examples of the classes of "workers engaged in . . . commerce" that were excluded from the FAA, than that Congress included those references to make a veiled statement of an implicit intent to exclude transportation-of-goods-in-commerce workers only. That likelihood becomes all but a certainty when it is remembered that labor initially objected to the FAA bill because its provisions might cover "the seaman[,] the railroadman[, and] sundry other workers in 'interstate and Foreign Commerce'" (*supra* at p. 12) – language that is

[14] *See* 44 Stats. at Large, Pt. I (1926) (showing laws in effect on December 7, 1925), at 1437-43, 1447-55 (railroad employees), 1510-26 (seamen). Petitioner never explains why Congress would have referred to "seamen" and "railroad workers" as shorthand for describing the narrow class of workers directly engaged in the transportation of *goods* in interstate commerce, given that railroads and ships obviously move passengers as well. Nor does petitioner explain why "seamen" and "railroad employees" would not be characterized as employees of *common carriers* – a characterization that includes providers of telephone and telegraph service. *See First Employers Liability Cases*, 207 U.S. at 497; Interstate Commerce Act, ch. 104, 24 Stat. 382 (1887), as amended.

The artificiality of petitioner's *ejusdem generis* analysis is also highlighted by the very court of appeal cases upon which it relies, which formulate differently the scope of the FAA §1 exclusion, based on how the case characterizes the connection between seamen and railroad employees. *See Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce"); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("actually in the transportation industry"); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997) ("employed directly in the channels of commerce"); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("employees actually engaged in the channels of interstate commerce").

tracked almost word-for-word in the §1 exclusion, as proposed by Secretary Hoover to resolve fully labor's objection to the inclusion of "workers' contracts" in the bill, and as enacted.

Fourth, petitioner cannot support its proffered construction of §1 by relying on the proposition that statutes should be construed to avoid surplusage. There is no rule against redundancies requiring Congress to write statutes in the fewest words possible.[15] Nor is there any law of conciseness authorizing the courts to rewrite statutory provisions that make their point in more words than necessary, when each of those words serves a legitimate statutory purpose – such as providing detail, emphasis, or example, or reassuring objectors and potential opponents that their objections have been met and that there is no basis for opposition. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 347-48 (1998). *Russell Motor Car Co., supra, Gooch, supra, and Harrison, supra*, are more than sufficient to show that there is a wide congressional prerogative to draft statutory provisions with some redundancies, where that drafting approach, in Congress' judgment, effectively communicates its legislative intent.

To be sure, where there are two equally plausible constructions of statutory language, the courts will incline to

[15] Indeed, there are redundancies throughout the FAA, as in many statutes throughout the period. *See Southern R. Co. v. United States*, 222 U.S. 20, 25-26 (1911) (construing scope of Safety Appliance Act broadly to encompass all railroads engaged in interstate commerce, despite "redundant" clause "in connection with" that could be read as imposing limitation, because broader reading "is in accord with the manifest purpose" of statute). For example, in FAA §1 itself, there was no need for Congress to have referred to: "workers engaged in *foreign or interstate* commerce" (because "commerce" was defined earlier in that paragraph), or to "any other *class of* workers" rather than simply "any other . . . workers."

the version that does not result in surplusage or redundant statutory language as more likely reflecting Congress' true intent. Here, however, petitioner never gets to the threshold point of establishing the plausibility of its proffered construction. For the reasons stated above, there is no textual basis for reading the FAA §1 exclusion of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" as excluding only transportation-of-goods-in-commerce workers, or for concluding that Congress intended such a limited exclusion. The mere fact that Congress could have written FAA §1 in fewer words is far too slender a reed upon which to base petitioner's wholesale rewriting of the statutory text to say something quite different from what its actual words say.

Indeed, while petitioner attempts to give its surplusage argument a measure of credibility by offering alternative versions of §1 that Congress *might* have enacted to exclude all worker contracts of employment, its own proffered construction of the exclusion provision could also have been drafted differently – and far more directly – if Congress had truly intended to exclude transportation-of-goods-in-commerce workers only. Petitioner suggests that if Congress had meant to exclude all contracts of employment, FAA §1 might have stated: "nothing herein contained shall apply to contracts of employment" or – to parallel the §2 coverage provision while using conventional Commerce Clause language – "nothing herein contained shall apply to contracts of employment of workers engaged in foreign or interstate commerce." Pet. Br. 22-23. But by the same token, if Congress had meant to exclude only transportation-of-goods-in-commerce workers from the FAA, Congress could easily have stated "nothing herein contained shall apply to contracts of employment of workers engaged in the transportation of goods in interstate commerce" –language that would make the point far more clearly and directly than the text of FAA §1 as petitioner would have it read.

Fifth, and finally, petitioner's construction of the FAA §1 exclusion as being limited only to transportation-of-goods-in-commerce workers fails because it attributes to Congress an intent that makes no sense. There is nothing in the legislative record or in logic that begins to explain *why* Congress would have singled out only the employment contracts of transportation-of-goods-in-commerce workers to be excluded from the FAA.[16] And, construing the FAA §1 exclusion as

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[16] Petitioner itself characterizes as "[c]onjecture," "speculat[ion]," and "surmise[]" the only explanation that it offers – that Congress excluded seamen and railroad employees because federal legislation *already* provided a mechanism for enforcing those workers' employment arbitration agreements, and that Congress excluded "any other class of workers" to "round out" the list in the expectation that "motor carriers" and other like transportation workers would soon unionize and obtain similar federal arbitration legislation. Pet. Br. at 26-27. As pointed out by Prof. Finkin and others, there is *no* support in the legislative history for this explanation, and it makes no sense. *See* Finkin I, 17 Berkeley J. Emp. Lab. L. 282, 291-92 (1996); Matthew Finkin, *Employment Contracts Under the FAA – Reconsidered*, 48 Lab.L.J. 329, 331 (1997). In 1925, the only class of employees covered by a federal arbitration law were seamen – and the seamen's statute did *not* provide for judicial enforcement of arbitration. *See* Act of June 7, 1872, ch. 322, 17 Stat. 262, 267, 46 U.S.C. §651. Seamen's Union President Furuseth was strongly *opposed* to such enforceability, and his principal objection to the original version of the FAA bill was that it *would* likely make enforceable arbitration awards entered against workers such as his members. *See supra* at p. 12. Although the Railway Labor Act *later* included a mandatory arbitration provision, that provision was not enacted until 1926 (Railway Labor Act, ch. 347, 44 Stat. 577 (1926)), one year *after* the FAA was enacted. In 1925 railroad employees were governed by the Transportation Act of 1920, ch. 91, §300, 41 Stat. 469, which made no provision for enforcement of arbitration clauses in disputes affecting individual railroad employees. And, whether Congress gave thought to truck drivers, bus drivers, or other workers in the motor transport industry in adopting the §1 exclusion, the fact remains that in 1925 there were no federal arbitration laws applicable to those workers, or to any other class of workers either within or outside the transportation industry. It therefore made little sense for Congress to group any other class of workers with "seamen" and

narrower than the FAA §2 coverage provision leads to a result that is paradoxical at best. Under petitioner's reading of §1, those employment contracts *most* involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 (*viz.*, contracts of employees engaged in interstate transportation) are *excluded* from Act's coverage; while those employment contracts having a *less* direct and less certain connection to interstate commerce – as to which federal regulation in 1925 would have been least supportable – would come *within* the Act's affirmative coverage and would not be excluded. Limiting coverage to those contracts *least* evidently within the reach of the federal constitutional authority justifying federal regulation is so anomalous that this Court should not attribute such an intent to Congress without the clearest evidence of such intent. *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 452-55 (1989).

In contrast, reading FAA §1 for what it quite evidently says makes perfect contextual sense, since there are entirely logical reasons for Congress to have excluded workers' contracts of employment as a class from the FAA. The historical record demonstrates that the proponents of the §1 exclusion drafted that language to satisfy objectors that the FAA would not cover employment contracts at all. The underlying *grounds* for that objection were the same whether the worker was a "seaman," a "railroadman" or one of the "sundry other workers in interstate or foreign commerce" (*supra*, at p. 12) – the perceived disparity in bargaining power between worker and employer.[17] The disparity in bargaining

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"railroad employees" as three classes of workers covered by a non-FAA federal arbitration law.

[17] In 1925, the heyday of the "yellow dog contract," Congress fully understood the disparity in bargaining power between employer and employee. Indeed, just six years after enacting the FAA, Congress declared that "under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain

power between worker and employer that was the root of the objection to FAA coverage of worker employment contracts was a *general* concern – not a concern limited to workers engaged in the transportation of goods in commerce. Thus, only a general exclusion of *all* workers' "contracts of employment" from the Act would satisfy the objectors – and that is what the §1 exclusion accomplishes, reading its words for what they say.

IV. Respecting Congress' Intent to Exclude All Employment Contracts From the FAA Furthers Important Federalism Values

Ultimately, this case is as much about federalism and the *States'* power to regulate workers' contracts of employment under their own laws and in their own courts as it is about the enforceability of employment arbitration provisions. Many of petitioner's *amici curiae* misanalyze this case by proceeding as if the question were whether mandatory pre-dispute employment arbitration agreements will be enforceable or unenforceable, with the answer turning on whether the FAA covers such agreements. But that is to presume, contrary to

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acceptable terms and conditions of employment . . ." Norris-LaGuardia Act, ch. 90, §2, 47 Stat. 70 (1932), *codified at* 29 U.S.C. §102; *see also* FELA, ch. 3073, 34 Stat. 232 (1906) (invalidating workers' waivers of statutory FELA rights). Congress in broadly excluding all "contracts of employment" from the reach of the FAA, evidently concluded, as the Seamen's Union and American Federal of Labor had urged, that the presumed level of voluntariness in commercial arbitration agreements between merchants did not exist in employment arbitration agreements between employers and employees. *See Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 402 n.9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1").

fact, that state law uniformly makes employment arbitration agreements unenforceable.[18]

What this case is about, then, is whether challenges to the enforceability of most individual employment arbitration agreements will be governed by the FAA or by state law. A holding that Congress in the FAA preserved the States' authority to regulate individual employment contracts will not make arbitration provisions in those contracts uniformly unenforceable – it will allow the States to decide issues of enforceability and procedure under their own laws, pursuant to their own policies.[19] At the same time, federal courts will be precluded from invoking the FAA to enjoin state court adjudication of cases filed by state residents alleging state-law employment claims – as the district court did here.

Even in ordinary statutory interpretation cases, Congress will not be presumed to have intended to displace state law. *See, e.g., English v. General Electric*, 496 U.S. 72, 82-83 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). This presumption against preemption is heightened in areas of traditional state concern, where this Court has always "[s]tarted with the assumption that the historic police powers of the States were not to be superseded . . . unless that

[18] Although many state arbitration laws parallel the FAA, several States have enacted specific laws, cited in the State Attorneys' General *Amicus* Brief, regulating the enforceability of employment arbitration agreements, including arbitration agreements imposed unilaterally as a condition of employment. If the FAA applies to employment contracts of workers other than seamen, railroad employees, and workers directly engaged in foreign and interstate transportation of goods, those State laws will be preempted to the extent the law applies to classes of workers covered by the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n. 11 (1984).

[19] Of course, in a case involving federal statutory rights as to which Congress "evinced an intention to preclude a waiver of judicial remedies" (*Gilmer*, 500 U.S. at 26, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)), the federal anti-waiver rule would govern by reason of the Supremacy Clause.

was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

Regulation of the individual employer-employee relationship has long been the province of the States.[20] And, for the reasons already stated, there is no "clear and manifest" evidence in the text or legislative history of the FAA that Congress in 1925 intended to cover employment contracts, and thereby preempt state law.[21]

V. Circuit City's Policy Arguments Do Not Illuminate the FAA Congress' Intent

Petitioner Circuit City and its *amici curiae* conclude with a series of pro-arbitration policy arguments to justify their reading of the FAA. Those arguments are neither

[20] *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (the establishment of labor standards falls within the traditional police powers of the State"); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *Second Employers Liability Cases*, 223 U.S. at 54-56. The States also have a considerable interest in providing their residents with access to a state court judicial system to adjudicate claims within those courts' jurisdiction. *See Atlantic Coast Line R.R. v. Broth. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970); *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893); *Brown v. Gerdes*, 321 U.S. 178, 188-89 (1944) (Frankfurter, J., concurring); *cf. Perry v. Thomas*, 482 U.S. at 494 (O'Connor, J., dissenting).

[21] Indeed, several members of this Court have questioned whether the 1925 Congress, which enacted the FAA at a time when arbitration was thought to be a purely procedural matter to be decided by the forum court, intended to preempt *any* state laws. *See Perry v. Thomas*, 482 U.S. at 493, (Stevens, J. dissenting); *id.* at 494 (O'Connor, J., dissenting); *Southland Corp.*, 465 U.S. at 36 (O'Connor, J., joined by Rehnquist, C.J., dissenting); *Allied-Bruce Terminix*, 513 U.S. at 283 (O'Connor, J., dissenting); *id.* at 284-85 (Scalia, J., dissenting); *id.* at 293 (Thomas, J., joined by Scalia, J, dissenting).

relevant to elucidating the intent of the 1925 Congress nor persuasive on their own terms.

1. Petitioner and its *amici curiae* cite several cases describing a "liberal federal policy favoring arbitration," and argue that this policy compels a narrow construction of the FAA §1 exclusion.[22] But that argument is circular, since the source of the federal policy is the FAA itself, and the boundaries of that policy must therefore be co-extensive with the FAA's coverage *and* exclusion provisions. Just as the federal policy favoring arbitration does not apply to employment arbitration agreements of "seamen" and "railroad employees," so is it inapplicable to "any other class of workers" that Congress excluded from the Act's coverage. The Court cannot start with petitioner's conclusion – that the FAA's "policy favoring arbitration" applies to employment contracts – and reason backward to construe the intended scope of the Act. As the Ninth Circuit stated in *Craft*:

> [Defendant] argues that §2 of the FAA contains a broad policy favoring arbitration. Thus, interpreting the FAA to exclude employment contracts would conflict with that policy. However, the argument is circular; the very question to be answered is whether §2 and its broad policy apply to employment contracts at all. *See Perry v. Thomas*, 482 U.S. 483, 489 (1987) ("Section 2, therefore, embodies a clear federal policy of requiring arbitration *unless* the agreement to arbitrate is not part of a contract" satisfying the requirements of that section.) (emphasis added). We decline to bootstrap a policy argument to expand the scope of §2. [177 F.3d at 1085-86 n.5 (emphasis in original)]

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[22] As several of respondent's *amici* point out, that policy is more accurately characterized, where it applies, as a policy favoring *knowing and voluntary* arbitration, based on the premise that arbitration is a matter of "consent not coercion." *Volt Info. Services, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see* EEOC Policy Statement on Alternative Dispute Resolution, 3 EEOC Compliance Manual (BNA) N:3055 (July 17, 1995).

2. Petitioner argues that a national employer that requires all workers to sign "a standardized arbitration agreement" as a condition of employment should not be faced with "conflicting and inconsistent state law," and that the importance of uniformity and predictability in employment relations suggests that Congress intended the FAA to cover all but a narrow category of contracts of employment. Pet. Br. 34. The immediate flaw in this argument is that it bears no relation to what Congress actually intended in 1925. The only workers over whom Congress might have had authority to impose a nationwide statute were, like seamen and railroad employees, workers engaged in foreign and interstate commerce. Yet Congress explicitly *excluded* those workers from the FAA. A perceived need for national uniformity in the enforcement of employment arbitration agreements could not have been a motivating factor underlying the FAA.[23]

Even if FAA §1 were as narrowly construed as petitioner urges, national uniformity would not be achieved. National employers are *already* subject to different employment statutes and common law principles in the different States.

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[23] We also note that additional non-uniformity would be *created* if petitioner's position were adopted. Heretofore, this Court has proceeded on the assumption that FAA §1 excludes all collective bargaining agreements ("CBAs") as a type of "contract of employment." *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 466-67 & n.2 (1957) (Frankfurter, J., dissenting) (perceiving in the Court's silence about the FAA, after full briefing, a "rejection though not explicit of the availability of the . . . Arbitration Act to enforce arbitration clauses in collective bargaining agreements"); *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 40 n.9 (1987) ("The Arbitration Act does not apply to 'contracts of employment' . . . but the federal courts have often looked to the Act for guidance in labor arbitration cases). If the FAA were construed to cover CBAs subject to a transportation-of-goods-in-commerce workers exclusion only, disputes regarding a single CBA could be treated differently – for example, with respect to an interlocutory appeal from a refusal to order arbitration – depending upon the particular job of the affected worker.

Mr. Adams' principal state law claim in this case, for example, is based on discriminatory same-sex retaliation and harassment – a claim recognized in California but not in many other states. Moreover, the FAA itself does not apply a uniform federal standard to issues of enforceability, but borrows general state unconscionability law to determine whether arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).[24]

3. Many of petitioner's *amici* offer an impassioned defense of employment arbitration and its perceived benefits and supposed fairness to workers. No one disputes that arbitration can be an excellent alternative to litigation when both parties *voluntarily* choose to arbitrate their disputes under fair procedures that ensure the protection of legal rights. But the paternalistic suggestion that employers unilaterally impose pre-dispute mandatory arbitration clauses on their workers for the benefit of those workers is not credible. Many academics and virtually all worker advocates dispute the assertion that workers benefit from their employers'

[24] While some of petitioner's *amici* make a related "reliance" argument, few employers order their business in reliance upon having federal rather than state law apply in the first instance to a question of arbitral enforceability. *Cf. Allied-Bruce Terminix*, 513 U.S. at 284-85 (Scalia, J., dissenting). Moreover, while those *amici* claim to have relied upon what they characterize as a virtually unbroken line of appellate authority, both the Ninth Circuit in *Craft*, 177 F.3d at 1086 n.6, 1087, and the Concerned Scholars in their Brief *Amicus Curiae*, point out that the position of the various circuits on the FAA §1 exclusion issue has diverged widely over the years. *See also* Br. in Opp. at 6-7 n.2. In addition, although this Court has had several opportunities to decide the issue itself since 1957, it has either expressly reserved the issue or has suggested, by its silence, that the FAA §1 exclusion is broad, and not limited to transportation workers.

imposition of such "agreements."[25] Permitting employers with vastly superior resources and bargaining power to dictate to their workers, as a condition of employment, the terms and procedures under which those workers may seek redress for the employers' own legal violations, thereby unilaterally substituting their own systems of justice for the legal enforcement mechanisms that Congress and the States have created, is not consistent with the goal of "fairness" extolled by petitioner's *amici*.

Although the enforceability of petitioner's arbitration provisions is not an issue presented to this Court, Circuit City's one-sided arbitration rules (J.A. at 13-14, 19-38) starkly demonstrate how unfair unilaterally-imposed pre-dispute arbitration terms can be, when dictated by an economically powerful employer to workers and job applicants who have no power to negotiate and no alternative but to quit their jobs or work elsewhere. *See Armendariz v. Foundation Health Psychcare Services, Inc.*, 2000 Cal. LEXIS 6120, __ Cal.4th __ (Cal. Sup. Ct. August 24, 2000). But, for the reasons stated, it should be the California state court, not the federal district court, that makes the enforceability determination in this case.

[25] *See, e.g.*, Briefs *Amicus Curiae* of the Lawyers' Committee for Civil Rights, Concerned Scholars, National Employment Lawyers Association, and American Association of Retired Persons, and authorities cited therein. Largely based on concerns of procedural and substantive unfairness resulting from mandatory pre-dispute arbitration programs imposed on workers by their economically more powerful employers, the EEOC, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution have each announced policies opposing the enforceability of condition-of-employment arbitration programs with regard to statutory discrimination claims.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION AND SUMMARY

Respondent and his amici strain to come up with a sensible interpretation of the plain language of FAA § 1 that supports the judgment of the Ninth Circuit in this case. But the various readings they propose – that the Act excludes *all* contracts of employment, that the Act excludes *only* contracts of employment of members of the working class, or that the Act excludes *only* contracts of employment of employees working in the stream of commerce (though the statute does not say any of these things) – collectively prove only one thing: that there is no plain meaning of the statute that would justify excluding respondent from FAA provisions requiring enforcement of his arbitration agreement.

To the contrary, the meaning of the § 1 exclusion must be established by reference to its context, including the analytical framework being used by this Court at and since the time of the Act's passage. That framework tells us two things: first, laws that applied to transactions "involving" or "affecting" commerce covered all transactions within the full sweep of Congress's commerce power, *see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); second, laws that applied to employees "engaged in interstate commerce" did not cover every employee within the sweep of the commerce power, *see United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271 (1975); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473 (1914). Thus, the category of employment contracts excluded from the FAA by the language of § 1 is necessarily smaller than the full range of employment contracts that Congress could have regulated.

That leaves the only real question to be resolved here: which subset of employment contracts is excluded from the sweep of FAA § 1? The precise statutory context provides the answer: employment contracts of (1) "seamen," (2) "railroad employees," and (3) "any other class of workers" who

are "engaged in foreign or interstate commerce" in the same way as are seamen and railroad employees. Only that reading makes sense of, and use of, each word in the statute, while also remaining consistent with the interpretation given these statutory terms of art by this Court in closely analogous circumstances. None of the various readings proposed by respondent and his amici satisfy those criteria. The private union proceedings characterized as "legislative history" and general policy arguments they raise neither contradict, nor justify departing from, the straightforward textual interpretation followed uniformly in the federal courts for almost 50 years.

I. FAA § 1 DOES NOT EXCLUDE ALL OF THE CONTRACTS OF EMPLOYMENT THAT ARE COVERED BY THE FAA

Recently this Court emphasized that not all statutory references to Congress's Commerce Clause authority are alike. *See* Pet. Br. at 13 (discussing *Jones v. United States*, 120 S. Ct. 1904 (2000)). To the contrary, any "qualifying word[s]" used by Congress are essential to understanding the intended reach of the legislation. *See Jones*, 120 S. Ct. at 1909. In this case, the ordinary meaning of the phrase "engaged in" as it modifies "commerce" entails a more active participation in particular commercial acts than a modifier such as "involving" or "affecting," each of which suggests a more passive or attenuated connection to commercial activity.

While not discussing or even citing *Jones*, respondent does not take issue with its basic premise. What respondent argues instead is that the qualifying words "engaged in" necessarily mean the same thing as "involving," so that "engaged in commerce" must mean the same thing as "involving commerce." That argument is wrong.

1. First, respondent and amicus United States cannot contend that their interpretive positions reflect a "plain meaning" approach to the statute. Their own briefs prove

otherwise. Indeed, respondent begins his analysis with a lengthy discourse on what he describes as the "legislative history," *see* Resp. Br. at 10-17 (which in fact focuses more on internal labor union proceedings than any legislative debates, *see* discussion *infra* Part III). That approach, of course, turns the accepted inquiry on its head, for "[i]t is axiomatic that the starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). Any doubt about whether the linguistic construction respondent eventually forwards is "plain" is resolved by review of the amicus briefs assembled on respondent's behalf, many of which urge interpretations of FAA § 1 directly at odds with respondent's. *See* discussion *infra* Part II.3 (discussing various alternatives).

The United States, on the other hand, does begin with the actual statutory text, specifically by comparing contemporaneous dictionary definitions of the terms "engaged" and "involved." *See* U.S. Br. at 4, 7-9. But the United States gets the inquiry fundamentally wrong: it cites dictionaries old and new as "confirm[ing] the identity of meaning, both in common and legal usage, between the terms 'engaged in' and '*involved in*' at the time the FAA was enacted." *See* U.S. Br. at 8 (emphasis added). FAA § 2, however, does not use the phrase "*involved in* commerce"; it says "*involving* commerce." Even assuming that being "involved in" an activity is tantamount to being "engaged in" that activity, doing something "involving" an activity quite obviously does not mean that one is necessarily "engaged in" the activity itself. For instance, a commentator on Monday Night Football has a job "involving" football, but nobody would say that he is "engaged in" the sport of football. Likewise, a prosecutor's job is one "involving" crime, but she is not "engaged in" crime. Thus, a worker whose job is one "involving commerce" as this Court defined the phrase in *Allied-Bruce* –

i.e., to mean anything "affecting" commerce – is not necessarily "engaged in" the actual conduct of commerce itself.

In all events, the United States elsewhere confirms that the meaning of these phrases as used in the FAA is *not* fixed by dictionaries. *See* U.S. Br. at 16 (proper construction of "engaged in commerce" depends on "the particular legal context of the statutory provision at issue"). We fully agree with this Court's observation, also cited by the United States, *see* U.S. Br. at 18: "The phrase 'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress." *American Building*, 422 U.S. at 277. The United States, however, would impose on that phrase an inflexible and acontextual meaning, rather than a meaning properly gleaned from "the particular legal context" in which the phrase is employed. In our view, the legal context established by pre-FAA cases and opinions of this Court construing pre-FAA statutes provides the best evidence of the distinct meanings of the terms of art "engaged in commerce" and "involving commerce" as used in the FAA.

2. Respondent also suggests that whatever distinctions may exist in those sources, *see* discussion *infra* Parts I.3, 4, can be disregarded in the context of the FAA because that statute uses the distinct phrases solely out of syntactical necessity. *See* Resp. Br. at 29-30. A transaction cannot "engage in" commerce, we are told, while a worker cannot "involv[e]" commerce. But in fact, the simplest way for Congress to have excluded from the Act's coverage all employment contracts would have been for Congress to exclude "all contracts of employment." Such an approach would have avoided all grammatical issues and ambiguity. Alternatively, to give §§ 1 and 2 parallel and equally broad meanings, Congress could have used in both the "involving commerce" language, clearly recognized as invoking the full sweep of Congress's commerce power. Just as § 2 makes the Act applicable to all transactions "involving commerce," had Congress intended to exclude all employment contracts, it most naturally would have written § 1 to exclude "all contracts of employment involving commerce." Respondent's assertion that "[g]rammatically, Congress could not have used the same connective in both provisions," Resp. Br. at 29, is not just wrong, but disregards the significant fact that Congress chose to use a distinct connective in each provision, which would not have been necessary had it in fact intended the meaning respondent advances.

3. Understandably, respondent and his amici would rather focus on extralegislative history, inapposite dictionary discussions, and grammatical misdirection than on the relevant opinions of this Court. To begin with, respondent, while acknowledging this Court's opinion in *Allied-Bruce*, flatly ignores the aspect of that opinion most pertinent to this case. In the very discussion on which respondent relies, *see* Resp. Br. at 26-27, this Court explicitly contrasted the scope of the § 2 phrase "involving commerce" with the phrase "in commerce," the phrase that appears in § 1. *See Allied-Bruce*, 513 U.S. at 273. The words "involving commerce," the Court explained, "are broader than the often found words of art 'in commerce.'" *Id.* Remarkably, respondent does not address this aspect of *Allied-Bruce*, much less come to terms with the necessary implication that the FAA § 2 coverage language is broader than the § 1 exclusion language.

Respondent also misstates this Court's decisions in *Gulf Oil* and *American Building*, and ignores *Bunte Bros.* altogether. In those cases, this Court held that the phrase "engaged in commerce" in the 1914 Clayton Act, and the phrase "in commerce" in the 1914 Federal Trade Commission Act, invoked less than the full range of Congress's commerce authority. *See* Pet. Br. at 15, 17. It follows that the subsequently enacted FAA, which contains precisely the same statutory term of art Congress had employed earlier, should be construed the same way. *See id.* at 13-17.

Respondent seeks to evade the force of these decisions by ignoring one and banishing the others to a footnote, and there insisting that "engaged in commerce" in the Clayton Act means less than the full sweep of Congress's commerce power only because Congress had amended the Act in 1950. *See* Resp. Br. at 25 n.10. That is simply incorrect: the *American Building* Court did raise the fact that the statute had been amended, but only *after* the Court had concluded, upon an independent analysis of the language, that the phrase "engaged in commerce" as it appeared in the pre-FAA statute did not cover the full range of activities within Congress's commerce power. *See American Building*, 422 U.S. at 276-79. And respondent ignores the Court's earlier observation in *Gulf Oil* that the Clayton Act's "in commerce" language, on its face and without regard to any subsequent amendments, "appears to denote only persons or activities within the flow of interstate commerce," and not activities that merely "affect commerce." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974). Respondent also wholly ignores *Bunte Bros.*, in which this Court "emphatically rejected" the contention "that 'in commerce' should be read as if it meant 'affecting commerce'" in the pre-FAA FTC Act. *American Building*, 422 U.S. at 276 (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 354-55 (1941)).[1] That contention merits equally emphatic rejection here.

4. Those decisions alone are enough to establish that the phrase "engaged in commerce" as it appeared in major pre-FAA congressional enactments was a statutory term of art

[1] The United States argues that the "25-year history of narrow construction" of the FTC Act provided justification for the narrow interpretation of the phrase "in commerce" adopted in *Bunte Bros.* *See* U.S. Br. at 16. Similar justification is provided by the even longer history of narrow construction of the FAA § 1 exclusion by the federal courts, dating back to 1953, *see* Pet. Br. at 11 n.4, 31 (citing cases), as well as Congress's consistent silence in the face of that long-settled construction, *see* discussion *infra* Part II.4.

referring to a category of people and/or activities well short of Congress's full commerce power. Even further support is found in pre-FAA opinions of this Court, which respondent and the United States struggle unsuccessfully to distinguish.

Our opening brief relied primarily on *Illinois Central Rail Road Co. v. Behrens*, 233 U.S. 473 (1914), which interpreted the statutory language of the Federal Employers Liability Act. *Behrens* explained that while Congress could have covered even employees engaged solely in *intra*state commerce working for interstate railroad companies, *see id.* at 477, the particular language Congress chose to employ in FELA covered only employees actually "engaged in *interstate transportation* or in work so closely related to it as to be practically a part of it." *Shanks v. Del., Lackawanna and W. R.R. Co.*, 239 U.S. 556, 558 (1916) (emphasis added).

Respondent argues that *Behrens* and other cases establish that Congress's use of the phrase "engaged in commerce" described the class of people constitutionally subject to the commerce power, as distinct from the class of persons outside the commerce power. *See* Resp. Br. at 21. Respondent is wrong: *Behrens* and other pre-FAA cases made clear this Court's view that Congress could have regulated employees employed solely in intrastate functions if those functions had a sufficient *effect* on interstate commerce. *See Behrens*, 233 U.S. at 477; *see also Stafford v. Wallace*, 258 U.S. 495, 528 (1922) (Congress has power to regulate intrastate activities "likely to affect interstate commerce prejudicially"); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 309 (1925) (holding federal antitrust laws governed purely intrastate mine strike due to effects on interstate commerce).

For that reason, FELA's so-called "temporal limitation," on which respondent and the United States place their emphasis, *see* Resp. Br. at 23-24; U.S. Br. at 10-13, is simply beside the point: even in view of that limitation, the relevant point is that *Behrens* and its progeny held the FELA phrase

"engaging in [interstate] commerce" applied only to employees actually engaged in interstate transportation or closely related functions, and *not* to other employees Congress had the constitutional authority to regulate. Against that interpretive backdrop, the Congress that used "engaged in . . . interstate commerce" in the FAA quite reasonably would have understood the phrase as referring only to a particular subcategory of employees similarly engaged in interstate transportation functions and not to every employee whose job had an "effect" on interstate commerce. Thus, even though the broader "involving commerce" language of FAA § 2 is now construed to reach economic transactions that "affect" interstate commerce, *see Allied-Bruce*, 513 U.S. at 277, neither the language of FAA § 1, nor the interpretive tradition against which that language was enacted, warrants giving the same sweeping construction to the § 1 exclusion.

5. As if all these objective, contextual indicia of Congress's intention in respect to the narrowness of the § 1 exclusion were not enough, direct evidence from the legislative history also reveals Congress's subjective perception that its commerce power included the authority to govern transactions merely "relating" to interstate commerce: "the [federal] control over interstate commerce reaches not only the actual physical shipment of goods but also *contracts relating to interstate commerce*." H.R. Rep. No. 68-96, at 3 (1924) (emphasis added), *quoted in* Pet. Br. at 29. Thus, though Congress evidently believed it could regulate employment contracts "relating to interstate commerce," Congress chose not to employ such language in defining the category of employment contracts excluded from the FAA. Instead, Congress excluded only those contracts of employees actually "engaged in interstate commerce," a formulation that, on its face, plainly suggests a category narrower than all contracts "relating to" interstate commerce. While respondent's analysis otherwise elevates aspects of the legislative history over the statutory text at every opportunity, respondent

makes no effort to address this historical evidence of Congress's perception that its commerce powers exceeded the narrow power to regulate the contracts of people and entities engaged in commerce.

II. THE SUBSET OF EMPLOYEES EXCLUDED BY FAA § 1 IS LIMITED TO THOSE EMPLOYEES ENGAGED IN THE TRANSPORTATION OF PEOPLE AND/OR THINGS IN COMMERCE

Once it is established that FAA § 1 cannot be read as excluding *every* employment contract otherwise within the reach of Congress's commerce power, the parties in this case bear the burden of identifying the subset of employment contracts most sensibly excluded by the language of FAA § 1. Neither respondent nor any of his amici carry that burden.

1. Under the rule of *ejusdem generis*, the general category of "any other class of workers engaged in . . . interstate commerce" is most sensibly construed by reference to the specific, narrower categories immediately preceding the general category: seamen and railroad employees. What all those classes of employees have in common is that they engage in the transportation of people and/or goods in commerce. *See* Pet. Br. at 18-23. That definition also coincides with the usage of the phrase in *Shanks* and its progeny in construing FELA, a usage that would have been familiar to the Congress that enacted the FAA.[2]

2. Respondent takes two tacks in response. First, relying on *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), he

[2] To be clear, the FELA cases are more important for the proposition that Congress could have regulated certain *intra*state activities but that FELA's "engaging in commerce" language did not reach that far. The FELA cases, however, also reflect a particular, consistent judicial construction of the phrase that Congress would have been aware of in employing the phrase in FAA § 1; they therefore add to the strong interpretive inference that the rule of *ejusdem generis* provides.

argues that *ejusdem generis* does not apply in this case. But the Court's determination that the canon was inapplicable in construction of the statute at issue in *Harrison* only confirms its applicability here. The *Harrison* Court refused to apply the canon because it applies only "when there is uncertainty," and in that case the Court "discern[ed] no uncertainty in the meaning of the phrase 'any other final action.'" *Id.* at 588. In this case, by contrast, there is obvious uncertainty as to the meaning of "any other class of workers engaged in . . . interstate commerce" *unless* the canon is applied. If that key phrase really just means, as respondent contends, "all workers," then there is no explanation why the statute (1) includes the preceding references to seamen and railroad employees since they obviously would fall within the class of "all workers", and (2) includes the "engaged in . . . interstate commerce" language at all. In other words, unlike in *Harrison*, application of the *ejusdem generis* canon is the only way to give meaning to each word in the statute.

3. The next tack taken by respondent and his amici to refute the *ejusdem generis* reading is to propose an array of alternative constructions of what each insists is, ironically enough, the "plain meaning" of the statute. But each of these readings suffers much deeper flaws than any respondent ascribes to the *ejusdem generis* construction.

(a) Respondent first attempts to avoid the import of § 1 altogether with an argument focusing exclusively on § 2: according to respondent, the § 1 language is redundant and irrelevant because § 2 itself applies only to "commercial deal[s] or merchant's sale[s]," Resp. Br. at 18 (quoting *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999)), and does not "encompass employment contracts at all." *Id.* The notion that the FAA governs the arbitrability of only commercial disputes and not employment disputes of any kind, however, has been squarely foreclosed by repeated decisions of this Court.

This Court already has held twice that a lawsuit brought by an employee against his employer arising out of the employment relationship was subject to arbitration under FAA § 2. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Perry v. Thomas*, 482 U.S. 483, 489-91 (1987). *Perry* and *Gilmer* cannot be reconciled with respondent's contention that the FAA solely governs the arbitration of disputes arising out of commercial deals and merchant's sales.[3] *Allied-Bruce* is equally to the point. There this Court held that § 2's coverage provision extends the Act to all transactions within "the limits of Congress' Commerce Clause power." 513 U.S. at 270. It concluded that § 2 "exercise[s] Congress' commerce power to the full." *Id.* at 277. Employment contracts are well within Congress's commerce power. They are therefore within § 2's coverage provision, subject only to the precise exclusionary language of § 1.[4]

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[3] Although in *Perry* and *Gilmer* the Court was not obligated to reach the § 1 question at issue here, both *Perry* and *Gilmer* unequivocally answered the § 2 coverage issue now urged by respondent.

[4] In view of *Perry*, *Gilmer* and *Allied-Bruce*, it is difficult to understand respondent's repeated references to the Act as one addressed to "commercial" disputes. Nothing in the Act's language limits its coverage to "commercial" disputes; it covers all "contract[s] evidencing *a transaction* involving commerce." FAA § 2 (emphasis added). Indeed, this Court's oft-stated admonition that the FAA was enacted to place arbitration agreements upon the same footing as other contracts refutes a suggestion that the Act's coverage is so limited. And certainly the term "transaction" plainly includes employment agreements. *See A Standard Dictionary of the English Language* 1915 (1910) (defining transaction as "any act affecting legal rights or obligations; in the civil law, the adjustment of a dispute by mutual concession and agreement. . . .").

To the extent respondent's references to "commercial" follow the Ninth Circuit's suggestion that § 2 limits the FAA to disputes between merchants, *see Craft*, 177 F.3d at 1089, this Court's cases applying the Act to disputes between merchants and retail customers, as in *Allied-Bruce* and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and to employer-employee disputes, as in *Perry* and *Gilmer*, once again foreclose respondent's interpretation. It also bears noting that, un-

(b) Respondent argues that FAA § 1 excludes "all contracts of employment." But that is decidedly *not* what the statute says. Respondent's own amicus National Academy of Arbitrators ("NAA") describes respondent's view as "astonishing," because § 1 "by its explicit terms . . . does not exempt all contracts of employment but only those entered into by certain kinds of employees . . . ." NAA Br. at 9.

Respondent does try to explain why § 1's specific language is consistent with his theory, but admits that the references to seamen and railroad employees would be unnecessary surplusage and speculates that they were simply added as examples. *See* Resp. Br. at 33-36. But respondent makes no effort at all to deal with the clause in the provision that is most problematic for his reading: the "engaged in foreign or interstate commerce" limitation. If Congress intended to exclude *all* employment contracts, there would have been no reason for Congress to limit the exclusion to the employment contracts of workers "engaged in . . . interstate commerce."[5] Although respondent elsewhere deems the "engaged in . . . commerce" language critical, it turns out to be mere surplusage under his own theory. In our view, by contrast, that language works *with* the specified examples to exclude the employment contracts of workers like seamen and railroad

til very recently, the American Arbitration Association assigned disputes arising under individual employment agreements to its "commercial" panel. *See* AAA Br. at 5 n.4.

[5] The law professors' brief is the only one adopting respondent's view which attempts an explanation. According to that brief, Congress would have "carefully define[d]" the employment contracts identified in § 1 because it "was well aware that the Supreme Court had both placed strict limits on the regulation of the employment relationship *and* refused to construe statutes flexibly in order to save them from unconstitutionality." Law Professors Br. at 12. That argument is nonsensical: this Court's cases *constricting* Congress's exercise of its commerce power would have given Congress no reason whatsoever to use narrow language to define the transactions *excluded* from the exercise of that power.

employees (and not, for example, those of telephone and telegraph employees, other workers engaged in interstate commerce but not in transportation work[6]).

(c) Respondent's amicus NAA correctly dismisses respondent's view of the statute, but goes on to argue that the exclusion applies only to the employment contracts of "workers," *i.e.*, all members of "the working class" (whomever that might be). *See* NAA Br. at 10. Contracts of management employees (whomever that might be), by contrast, *are* covered by the FAA under the NAA's view. *See id.* at 11. But, again, that is not what the statute says. In fact, the statute explicitly contradicts that reading: the statute specifically excludes the employment contracts of "railroad *employees*," a category that is facially broader than the "workers" on whom NAA says the statute focuses exclusively.

(d) Another of respondent's amici, the American Trial Lawyers Association ("ATLA"), also rejects respondent's reading of the statute. According to ATLA, the FAA § 1 exclusion applies only to workers engaged in "the stream of commerce" – *i.e.*, the production, distribution and sale of goods in commerce. *See* ATLA Br. at 5.

Our position properly focuses on the textual and historical context of the phrase "engaged in commerce" as used in FAA § 1 – in particular, as the general category following two specific examples, and in light of its accepted meaning in the FELA context. ATLA's reading, on the other hand, would require this Court to ignore the statutory references to seamen and railroad employees, and to disregard Congress's familiarity with the meaning of the same phrase that it used

[6] *See Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877) (telegraphs are instrumentalities of interstate commerce).

in FELA.[7]

4. Ultimately, respondent's and his amici's critiques of the *ejusdem generis* reading of § 1 disregard the fundamental point that the limitation of the § 1 exclusion to transportation workers has been the dominant – indeed, exclusive – interpretation followed in the federal courts for almost 50 years. Contrary to ATLA's suggestion, *see* ATLA Br. at 13-15, in all that time the transportation-worker interpretation has never been considered unworkable or even difficult to apply. *See* Pet. Br. at 24 (citing cases). Also, despite several amendments to the statute,[8] Congress does not appear to have ever even considered amending the FAA to exclude contracts of employment beyond those of transportation workers. As this Court recognized in narrowly construing the phrase "engaged in commerce" as it appears in the 1936 Robinson-Patman Act (also enacted before the expansion of Congress's commerce power), "the courts in nearly four decades of litigation have interpreted the statute in a manner directly contrary to an 'effects on commerce' approach." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). As it did in *Gulf Oil*, this Court should decline to adopt a broad reading of the "engaged in commerce" term of art "[i]n the face of this long-standing interpretation and the continued congressional silence." *Id.* at 200-01.

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[7] ATLA's implicit suggestion that the coverage of FAA § 1's exclusion of "seamen" should parallel the membership rolls of the Seafarer's International Union (*see* ATLA Br. at 14) – a union that did not even exist when the FAA was enacted – defies comprehension. The more sensible interpretation of the "seamen" to whom Congress was referring is the same "seamen" already governed by other federal regulation at the time. *See* Shipping Commissioners Act, ch. 322, 17 Stat. 262 (1872) (amended 1890).

[8] *See, e.g.*, Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5120 (1990); Pub. L. No. 100-702, § 1019(a), 102 Stat. 4671 (1988).

III. THE VAGUE LEGISLATIVE HISTORY DOES NOT SUPPORT RESPONDENT'S READING

Respondent asks this Court to look to the legislative history of the FAA rather than its text in construing the § 1 exclusion. But whether one starts with the history or ends with it, it provides no help: the § 1 exclusion was not discussed in either committee report on the bill, was not discussed on the floor by any member of Congress,[9] and was not mentioned by a single witness in the 1924 joint hearing held on the bill. *See* Employers Group Br. at 18; *see generally id.* at 17-29 (discussing ambiguity of legislative history).[10]

The primary historical evidence on which respondent relies – reports of labor's objections to the bill – comes not from the legislative history of the statute at all, but exclusively from the proceedings of the International Seamen's Union convention and other purely internal union proceedings. *See* Resp. Br. at 12-13 & n.5. The other sources of Congress's supposed intent regarding § 1 are statements made by non-legislators to congressional committees, *see* Resp. Br. at 13-15,[11] which generally are "without weight in

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[9] The only floor statements of actual legislators cited by respondent, *see* Resp. Br. at 15-16, went exclusively to the intended scope of § 2, an issue resolved by *Perry*, *Gilmer*, and *Allied-Bruce*. *See supra* p. 11.

[10] Even the scholar on whom respondent and his amici principally rely confesses that there is "no [legislative] record whatsoever concerning the [§ 1] exemption." Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. of Emp. & Lab. L. 282, 295 n.61 (1996).

[11] Even if it were relevant, the testimony of ABA representative Piatt regarding the Seamen's Union objection focuses only on "industrial arbitration" and "labor disputes," terms which refer only to collective bargaining disputes. *See Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995). Respondent's suggestion that the Seamen's Union's objection extended to disputes arising under individual employment contracts, *see* Resp. Br. at 14 n.6, again relies on information altogether outside the legislative history. *See* note 10, *supra*.

the interpretation of a statute." *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931); *accord Kelly v. Robinson*, 479 U.S. 36, 51 (1986). Certainly statements by non-legislators to union conventions cannot carry more weight. By contrast, the authoritative Senate report *does* state that the FAA "follows the lines of the New York arbitration law enacted in 1920." S. Rep. 68-569, at 3 (1924). Significantly, the New York law on which the Act was modeled did cover individual employment contract disputes. *See* Wesley Sturges, *A Treatise on Commercial Arbitrations and Awards* 108 n.24 (1930) (citing cases).

IV. THE POLICY ARGUMENTS INVOKED BY RESPONDENT AND HIS AMICI DO NOT SUPPORT RESPONDENT'S VIEW OF FAA § 1

The issue before the Court is the coverage of the FAA, established pursuant to § 2 of the Act, and the exception of certain contracts from the Act's coverage, as provided in § 1 of the Act. Although the impact of this Court's ruling will be substantial and wide-spread, the question presented is a narrow one which should be resolved by application of well-established principles of statutory construction.

Implicitly recognizing the difficulty in advocating a Ninth Circuit construction of the FAA which had required a determination that the traditional rules of statutory interpretation were inapplicable, *see Craft*, 177 F.3d at 1094 (Brunetti, J. dissenting), respondent and his amici have supplemented their "legislative history" arguments with an array of policy-based arguments because, they contend, various public interests will be advanced if the Ninth Circuit is affirmed. The assorted arguments they offer are unavailing, and relate to issues beyond the narrow grant of certiorari. Indeed, in advancing such arguments, respondent and several of his amici would have this Court affirm the ruling below on the basis of considerations that were neither presented to nor relied upon by the court of appeals.

1. Respondent claims that his view "furthers important federalism values." *See* Resp. Br. at 39. This contention ultimately turns on the unsupportable premise that arbitration of employment disputes is traditionally the exclusive domain of the States. Respondent and his amici, however, cite only cases observing that some regulation of employment relationships is among the many areas within the states' police power; these cases do not hold that states have any special dominion in this area. *See* Resp. Br. at 41; U.S. Br. at 29; States Br. at 6-8. Nor could they, for statutes such as the FELA, FLSA, NLRA, Title VII, ADEA, ERISA, WARN, COBRA, FMLA, EPPA, and ADA show that in the last 75 years the employment relationship has become increasingly, albeit not exclusively, a domain of federal law.

Indeed, respondent and his amici contend that the FAA § 1 exclusion should be interpreted broadly so that states can make their own rules regarding arbitration of employment claims. However, given the dominance of federal law in this area, it is undoubtedly arbitration of federal statutory claims that is most often at issue, and neither respondent nor his amici attempt to argue that states would be entitled to apply their own arbitration laws to federal-law claims. *See* Resp. Br. at 40 n.19; U.S. Br. at 30 n.13. Respondent's "federalism" concerns thus turn out to have little practical consequence for states' interest, but if accepted will have significant – and adverse – practical consequences as to the usefulness of arbitration. Although this Court repeatedly has recognized the liberal federal policy favoring arbitration, the deference to federalism urged by respondent would eliminate the stability provided by the body of federal substantive law of arbitrability. The prompt arbitration of claims arising under substantive state and federal employment laws which is now available will be replaced with uncertainty and delay as state and federal appellate courts grapple with the following questions to determine the enforceability of agreements to arbitrate employment claims: Is the

arbitration provision contained in a "contract of employment"? Does the state law of the forum state favor or limit arbitration? Are the limitations applicable to all arbitration agreements, or only to arbitration of certain claims? Is the case filed in state or federal court? Are the claims based on state law, federal law, or both? Will the arbitrability of federal claims asserted in federal courts vary based upon the law of the forum state? Will arbitrability of federal claims asserted in state court vary based upon the law of the forum state? What is the effect of removal based on diversity? Where there is a choice of law provision in the agreement, what state's arbitration law will be applicable? To what extent may claims be bifurcated between federal court and arbitration or state court and arbitration? Creation of such a complex matrix is such a daunting task that arbitration of employment claims may not survive as a viable alternative to litigation.

2. Respondent sought to avoid arbitration even before the Ninth Circuit raised the issue of the FAA § 1 exclusion, and most of his amici long have been vigorous and outspoken opponents of the use of arbitration in the workplace. Many of them have repeatedly offered their views as amici curiae, opposing efforts by employers across the nation to enforce arbitration agreements.[12] Here, too, they complain about the supposed unfairness of arbitration

[12] For example, the General Counsel of the EEOC, who is among the counsel on brief for the United States, frequently files briefs opposing efforts by employers to enforce arbitration agreements (as in three other cases involving the petitioner), often asserting essentially the same arguments that were rejected by this Court in *Gilmer*. The EEOC claims that it is "not unmindful" of this Court's decision in *Gilmer*, but believes that mandatory arbitration "agreements are inconsistent with the civil rights laws" and implies that "Congressional action to correct Supreme Court departures from congressional intent" is warranted. EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, § 1 n.2, § IV.B. (1997).

and predispute arbitration agreements between employers and employees, *see e.g.*, AARP Br. at 6-16; Lawyers Comm. Br. at 2-5, 12-13; States Br. at 10-15. All of these complaints were raised in *Gilmer* and rejected in no uncertain terms:

> Such generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protection afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes. . . . We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.

500 U.S. at 30 (internal quotation marks and alterations omitted). As to amici's argument that such agreements reflect an inherent disparity in bargaining power between employer and employee, the Court's rejection was equally unequivocal: "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33. If in individual cases, the Court further explained, there are "well-supported claims that the agreement to arbitrate resulted from the sort of fraud or over-whelming economic power that would provide grounds for the revocation any contract," then a particular agreement may not be enforceable. *Id.* No such claims are at issue here.[13]

[13] Respondent himself admits that this case does not present the adequacy of petitioner's arbitration procedures, *see* Resp. Br. at 45, but he nevertheless feels compelled to attack on those procedures, *id.* Indeed, in this case the only determination made as to the adequacy of the procedures is reflected in the district court's granting of the original petition to compel arbitration. *See* Joint Appendix at 43-52. Respondent's complaints – on which several amici expand, *see, e.g.*, Lawyers Comm. Br.

3. In the final analysis, only one policy interest recognized by this Court's FAA cases is relevant here: the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), which in turn counsels in favor of including arbitration agreements in the workplace within the broad coverage of the FAA unless they are clearly excluded, *See* Pet. Br. at 34. Respondent protests that the FAA's liberal policy favoring arbitration cannot be invoked where, as here, the very scope of the statute reflecting that policy is at issue. *See* Resp. Br. at 42. Respondent is wrong: that is precisely what this Court did in determining the scope of § 2 in *Allied Bruce*, 513 U.S. at 275. To the extent the reach of the § 1 exclusion is ambiguous, the broad interpretation of § 2 invoked in *Allied-Bruce* to effectuate the Act's fundamental purpose likewise counsels in favor of a narrow construction of the § 1 exclusion. *See* 2A *Sutherland Statutory Construction* §47.11 (6th ed. 2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

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at 2-5 – are not only irrelevant, but inaccurate. Petitioner's Dispute Resolution Rules and Procedures, set forth in the Supplemental Joint Appendix ("S.J.A.") demonstrate that the program is neither unfair nor oppressive. The comprehensive rules provide for qualified, neutral arbitrators selected by both parties, and application of the substantive law of the jurisdiction. They provide for broad discovery, the right to representation by counsel and to subpoena witnesses, and authorize awards of attorney's fees. Injunctive relief, backpay, frontpay, compensatory and punitive damages may be awarded. *See* S.J.A. at 19-39. The limitation on some forms of damages contained in the S.J.A. has been modified automatically pursuant to Rule 18, *see* S.J.A. at 37, as a result of recent rulings. Counsel in all pending cases, including Respondent's counsel, were notified of the change.

Respectfully submitted,

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(18)

SEP 19 2000

No. 99-1379

In the Supreme Court of the United States

CIRCUIT CITY STORES, INC., PETITIONER

v.

SAINT CLAIR ADAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Arbitration Act applies to contracts of employment.

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I.R. Macneil, *American Arbitration Law* (1992) 19
Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. (1923) 4, 20, 21
Webster's Third New Int'l Dictionary (1976) 8
Webster's New Int'l Dictionary of the English Language (1917) 7, 8

In the Supreme Court of the United States

No. 99-1379

CIRCUIT CITY STORES, INC., PETITIONER

v.

SAINT CLAIR ADAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the proper interpretation of the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, as applied to a pre-dispute employment contract. Although this case involves claims of discrimination under state law, the United States has a significant interest in its outcome. The scope of the exclusion in Section 1 of the FAA for employment contracts may affect the enforcement of arbitration agreements covering claims of employment discrimination under federal civil rights statutes. Similarly, this Court's ruling may affect employment discrimination claims brought by the Secretary of Labor against federal contractors, see 29 U.S.C. 793-794 (1994 & Supp. IV 1998); 38 U.S.C. 4211-4212 (1994 & Supp. IV 1998), and financial aid recipients, 42 U.S.C. 2000d *et seq.*; 29 U.S.C. 2938 (Supp. IV 1998). In addition, this case may affect enforcement of anti-retaliation provisions in federal statutes designed to protect employees who report public health and safety violations, as well as enforcement of various federal labor standards. See, *e.g.*, 30 U.S.C. 815(c); 29 U.S.C. 660(c); 29 U.S.C. 216 (1994 & Supp. IV 1998); 29 U.S.C. 2617 (1994 & Supp. IV 1998). Finally, state anti-

discrimination laws play an integral role in the "scheme of interrelated and complementary state and federal enforcement" under federal anti-discrimination statutes. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 65 (1980). The United States therefore has an interest in the ability of the States to establish procedures for resolving employment-related claims arising under state law.

STATEMENT

1. The Federal Arbitration Act was enacted into law in 1925. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883. Its basic coverage provision provides that it applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. 2. The FAA provides that such provisions in covered contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Ibid.* In the exclusion at issue in this case, however, the statute provides that it does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1.

2. Respondent Saint Clair Adams applied for a position with petitioner Circuit City Stores, Inc., in October 1995. J.A. 12-17. Prospective applicants for employment with petitioner must sign a "Circuit City Dispute Resolution Agreement." *Ibid.* That form requires that employees submit all claims and disputes to mutually binding arbitration. J.A. 54; see J.A. 12. The terms of the form specify that it includes "all previously unasserted claims, disputes or controversies arising out of or relating to [the] application or candidacy for employment, employment and/or cessation of employment with Circuit City, * * * includ[ing] claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil

Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort." J.A. 13.

Respondent signed the form and was hired to work for petitioner. J.A. 54. Respondent left employment with Circuit City in November 1996. J.A. 48. On November 26, 1997, respondent filed a state-law civil action in California state court against petitioner and other defendants, alleging discrimination and harassment on the basis of respondent's sexual orientation. J.A. 10, 47-48.

Petitioner filed an action in United States District Court for the Northern District of California seeking to compel arbitration of respondent's claim. J.A. 55. The district court held that the arbitration provision was enforceable under the FAA, and it therefore granted petitioner's request for an order compelling arbitration and staying state court proceedings. J.A. 43-45.

3. The Ninth Circuit reversed. J.A. 53-56. The court of appeals held that, because the arbitration agreement "was a condition precedent to [respondent's] employment," it "was an employment contract." J.A. 56. The court had previously held, in *Craft* v. *Campbell Soup Co.*, 177 F.3d 1083, 1094 (1999), that, because of the Section 1 exclusion, "the FAA does not apply to labor or employment contracts." The court therefore held the FAA inapplicable in this case. J.A. 56.

SUMMARY OF ARGUMENT

In provisions unchanged since its enactment, the Federal Arbitration Act covers arbitration provisions in every contract relating to "a transaction involving commerce." 9 U.S.C. 2. It excludes, however, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. This case concerns the scope of the Section 1 exclusion and its relationship to the Section 2 coverage provision. In particular, it presents the question whether excluding contracts

of "any other class of workers engaged in foreign or interstate commerce" excludes all employment contracts that would have otherwise been brought within the FAA by the Section 2 coverage provision. That question can be answered in two steps.

First, the terms immediately at issue—"involving commerce" in the Section 2 coverage provision and "engaged in * * * commerce" in the Section 1 exclusion—are coextensive. Standard dictionary definitions available to Congress in 1925 (like those of today) defined each of the crucial terms—"involved" and "engaged"—in terms of the other. Decisions of this Court made clear that the "engaged in * * * commerce" formulation indicated an intent to go as far as Congress thought it could in the exclusion, just as this Court has held Congress went to the far reaches of its Commerce Clause authority when it used the "involving commerce" language of the Section 2 coverage provision.

Indeed, the precise language of the Section 1 exclusion was proposed to Congress by a distinguished witness (then-Secretary of Commerce Herbert Hoover), and a similarly worded provision was proposed by the chairman of the ABA committee that had originally drafted it. Each of them made clear that this or similar language should be added, in Hoover's words, "[i]f objection appears to the inclusion of workers' contracts in the law's scheme." *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923). Therefore, each of them, as well as the Congress that accepted their proposal, believed that the terms of the Section 1 exclusion were sufficient to remove employment contracts from the ambit of the Section 2 "involving commerce" formulation. Petitioner's contention that "involving commerce" and "engaged in * * * commerce" had different meanings at the time Congress drafted the FAA—a contention on which petitioner rests its argument—has no foundation.

Second, no principle of statutory construction provides a basis to depart from Congress's intent, as expressed in the plain words of Section 1 of the FAA, to exclude employment contracts from the statute's reach. Petitioner invokes the canon of *ejusdem generis* to limit the meaning of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" to transportation workers, on the ground that the two specific categories ("seamen" and "railroad employees") are categories of transportation workers. Though *ejusdem generis* is useful where a statute is ambiguous, however, the statutory text and congressional purpose here are clear. Moreover, there is no reason why Congress would have wanted to limit the FAA exclusion to transportation workers, since the same reasons that justify the exclusion of transportation workers (including legislative doubts that genuine consent can simply be assumed when the employee signs a form arbitration agreement offered on a take-it-or-leave-it basis) would apply equally to other workers. Applying *ejusdem generis* as formulated by petitioner would oust the States from their traditional authority over employment relations—a result that this Court should not read into the statute without a more express indication of Congress's intent. It would also perversely attribute to the 1925 Congress that enacted the FAA an intent to subject to the FAA non-transportation workers (over whom Congress had little constitutional authority in 1925), leaving the States with authority over only transportation workers (over whom the 1925 Congress would have had the clearest constitutional authority).

ARGUMENT

I. BECAUSE "ENGAGED IN * * * COMMERCE" IN THE SECTION 1 EXCLUSION AND "INVOLVING COMMERCE" IN THE SECTION 2 COVERAGE PROVISION WERE UNDERSTOOD IN 1925 AS COEXTENSIVE, THE ORDINARY MEANING OF THE SECTION 1 PHRASE EXCLUDES FROM THE FAA ALL EMPLOYMENT CONTRACTS THAT COULD COME WITHIN THE FAA UNDER SECTION 2

Sections 1 and 2 of the FAA have remained unchanged since they were enacted in 1925. See 43 Stat. 883. Section 2 is the basic coverage provision of the Act. It sets forth the Act's core principle that arbitration provisions in covered contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 also specifies what the Act covers: "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract [or] transaction." *Ibid.* For purposes of this case, the key language of Section 2 is that requiring a transaction "involving commerce."

Section 1 of the FAA expressly excludes certain contracts from the ambit of the FAA, providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. In *Craft* v. *Campbell Soup Co.*, *supra*, the court of appeals held that the Section 1 exclusion, by the use of the terms "contracts of employment of * * * any other class of workers engaged in foreign or interstate commerce," excluded all contracts of employment from the FAA. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (reserving that question). The court concluded that all employment

contracts that could come within the ambit of the FAA by virtue of the "involving commerce" coverage language of Section 2 are excluded as contracts of "workers engaged in * * * commerce" under Section 1. *Craft*, 177 F.3d at 1094. That conclusion is correct.

A. In 1925 When The FAA Was Enacted, The Terms "Involving Commerce" And "Engaged In Commerce" Were Coextensive

Petitioner rests its argument on the premise that "the § 1 exclusion of employment contracts for workers 'engaged in commerce' must exclude a class of contracts well short of the overall sweep of the statute as defined by the broader language of § 2." Pet. Br. 16. As a matter of the plain meaning of the words used by Congress when it drafted the FAA in 1925, that is incorrect. The plain meanings of "involving commerce" in Section 2 and "engaged in * * * commerce" in Section 1, as given in general and legal dictionary definitions of the day, were coextensive. Therefore, by excluding "contracts of employment of * * * workers engaged in * * * commerce" in Section 1, Congress excluded any employment contract "involving commerce" within the meaning of Section 2.

Absent indications to the contrary, Congress is ordinarily presumed to have used the ordinary and common meanings of the terms it employs in statutes. Those ordinary meanings, however, are necessarily the meanings of the terms "at the time Congress enacted the statute." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Dictionaries from the period when Congress enacted the FAA establish that the terms "involved in" and "engaged in" had the same meaning.

The authoritative dictionary of American English at the time Congress enacted the FAA was *Webster's New International Dictionary of the English Language* (1917). Among the definitions provided in that dictionary for "involve" is "[t]o *engage* thoroughly; to occupy, employ, or absorb." *Id.*

at 1138 (emphasis added). The dictionary thus gave "engage" as one meaning of "involve." Similarly, among the definitions given in that dictionary for "engage" are "[t]o become involved or entangled" and "[t]o embark in a business; to take a part; to employ or *involve* one's self; to devote attention and effort; to enlist; as, to *engage* in controversy." *Id.* at 725 (first emphasis added; second in original). The dictionary thus gave "involve" as one meaning of "engage." See *Smallwood* v. *Jeter*, 244 P. 149, 153 (Idaho 1926). Each of the terms "involve" and "engage" was defined in terms of the other.[1]

Editions of Black's and Bouvier's legal dictionaries from 1910 and 1914 do not define "involve" and define only specialized meanings of "engage" not relevant here.[2] But in 1933, a few years after the enactment of the FAA, a new edition of *Black's Law Dictionary* added a definition of "engage" as "[t]o employ or *involve* one's self; to take part in; to embark on." *Black's Law Dictionary* 661 (3d ed. 1933) (emphasis added). That confirms the identity of meaning, both in common and legal usage, between the terms "engaged in" and "involved in" at the time the FAA was enacted.

In short, at the time Congress enacted the FAA, the common meanings of the term "involving commerce" in the Section 2 coverage provision and "engaged in * * * commerce" in the Section 1 exclusion were coextensive. To be sure, the

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[1] Modern dictionaries similarly define the two terms in part in terms of each other. See *Webster's Third New Int'l Dictionary* 751 (1976) (defining "engage" as "to employ or involve oneself"), 1191 (defining "involve" as "to draw in as a participant: engage, employ").

[2] Both dictionaries define "engagement" to mean "[i]n French law" "[a] contract" or "[t]he obligation arising from a *quasi* contract" and also to refer in our own law to non-binding promises by married women. *Black's Law Dictionary* 425 (2d ed. 1910); 1 *Bouvier's Law Dictionary* 1040 (3d rev. 1914). Bouvier's also defines "engaged" to mean "[w]ithin the meaning of a bylaw of a fraternal order, one is engaged in the sale of liquor who is a partner in the saloon business, though he performs no labor in or about the saloon and takes no active part in the business." *Ibid.*

terms were not identical; while abstract entities (such as transactions) could "involve" commerce, only people or business organizations could "engage in" commerce. But although the usage of the two terms varied in this way, their common and ordinary meaning was identical.[3] Accordingly, by excluding "contracts of employment of * * * workers engaged in * * * commerce" from the FAA, Congress excluded all contracts of employment "involving commerce" under Section 1 of the FAA.

B. This Court's Cases Establish That Congress Used Both "Involving Commerce" And "Engaged In * * * Commerce" To Reach To The Full Extent Of Its Commerce Clause Power, As Then Understood

1. This Court held in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995), that Congress intended the FAA to cover all contracts within the scope of its Commerce Clause power when it provided for coverage of contracts "involving commerce" in the FAA's Section 2 coverage provision. The Court explained:

> The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively—as * * * we do here.

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[3] Petitioner's brief, apparently unwittingly, testifies to the modern equivalence of the two terms in its descriptions of the workers covered under his view of the statute. See Pet. Br. 8 ("workers who are actually *engaged* in the movement of goods"), 22 (workers "*engaged* in actual transportation"), 22 (workers "*engaged* in the actual interstate transportation of goods"), 22 ("workers actually *involved* in the interstate transportation of goods"), 23 (workers with "direct *involvement* in the interstate transportation of goods"), 25 n.12 (workers "directly *engaged* in transport of goods") (emphases added in each quotation).

Id. at 275. As we show below, the same is true of the "engaged in * * * commerce" language used in Section 1 of the FAA. That language indicated an intent by Congress to legislate to the full scope of its Commerce Clause power over employment. It would be anomalous to adopt an expanding interpretation of the "involving commerce" language in Section 2 of the Act without interpreting the "engaged in * * * commerce" language in Section 1 to have the same flexibility. Indeed, to do so would defeat—not effectuate—the intent of Congress that whatever contracts of employment were swept within the FAA by Section 2's coverage provision should be excluded by the Section 1 exclusion. See R.A. Epstein, *Fidelity Without Translation*, 1 Green Bag 2d 21, 27-29 (1997).

2. In 1925, Congress's power to regulate employment relationships had been held by this Court to be severely restricted. Congress described the relatively small number of workers over whom it could exercise its Commerce Clause power as "engaged in commerce." Constitutional disputes concerning the scope of Congress's Commerce Clause power over employment had to do with whether Congress could regulate all employees who "engaged in commerce," and neither Congress nor this Court suggested that Congress could regulate beyond that class. The history of the Federal Employers' Liability Acts provides an illustration.

a. In 1906, Congress first enacted what has become known as the first Federal Employers' Liability Act (FELA). Act of June 11, 1906, ch. 3073, 34 Stat. 232. That Act provided that "every common carrier *engaged in trade or commerce* * * * between the several States * * * shall be liable to any of its employees" for damages resulting from specified negligent acts. *Ibid.* (emphasis added). Relying on the "any of its employees" language, this Court held that, even if the *employer* was generally "engaged in * * * commerce," the Act was unconstitutional because Congress had the power to provide a remedy only for *employees* who

were actually engaged in interstate commerce at the time of the injury. As the Court explained, "[t]he act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, *without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury*, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." *Howard* v. *Illinois Cent. R.R.*, 207 U.S. 463, 498 (1908) (emphasis added). The Court explained that among the forbidden "subjects" regulated by the statute would be a railroad doing interstate and local business "having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force." *Id.* at 498-499. At the time of *Howard*, Congress's Commerce Clause power thus did not even extend so far as providing legal rules generally governing employees working for common carriers who were "engaged in trade or commerce."

Congress took heed of the decision in *Howard* and enacted a revised FELA the same year. The revised statute, now limited by its terms to railroads, provided that "[e]very common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce*." 45 U.S.C. 51, Act of Apr. 22, 1908, ch. 149, 35 Stat. 65 (emphasis added). The Court upheld the constitutionality of the revised FELA because, "unlike the one condemned in [*Howard*], [it] deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees *while engaged in such commerce*." *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 51-52 (1912) (emphasis added). Under *Howard* and *Mondou*, Congress's Commerce Clause power extended only to employees who were personally engaged in interstate commerce, and even then only to those employees *while* they were engaged in interstate commerce.

In cases beginning the following year, the Court retreated slightly from these principles, so that employees while engaged in work that was inextricably tied to covered employment were also covered. For example, in three cases decided on May 26, 1913, the Court held that the FELA constitutionally provided coverage for an iron worker injured while repairing a bridge for an interstate railroad, *Pedersen* v. *Delaware, Lackawanna & W. R.R.*, 229 U.S. 146 (1913); a clerk keeping track of railroad cars in a rail yard of an interstate railroad, *St. Louis, San Francisco & Tex. Ry.* v. *Seale*, 229 U.S. 156 (1913); and a worker in a rail yard guiding a locomotive through some switches so that it could be connected to an interstate train, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114 (1913). Those cases did not alter the principle that Congress's authority to regulate employment was limited to employees who were engaged in interstate commerce *while* they were engaged in such commerce. But they did slightly expand the meaning of "engaging in commerce," the linguistic formulation Congress used to express its intent to exercise all of its Commerce Clause power.

b. The following year, in *Illinois Central Railroad* v. *Behrens*, 233 U.S. 473, 477 (1914), the Court had reached the point where it "entertain[ed] no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." But the Court held in *Behrens* that the revised FELA nonetheless did not cover a railroad worker injured in a collision as part of a crew that "was moving several cars loaded with freight which was wholly intrastate," even though the same crew frequently moved interstate cars over the same tracks. *Id.* at 476. *Behrens* thus held that, although Congress had constitutional power to regulate the worker in that case, the revised FELA did not do so.

Petitioner errs in citing *Behrens* for the proposition that the "engaging in commerce" language in the revised FELA "did not extend to the full range of Congress' Commerce Clause authority." Pet. Br. 18. The Court's decision in *Behrens* did not turn on whether the employee or employer were "engaging in commerce." It turned on the temporal qualification in the revised FELA—the "while" clause. As the Court explained, "[g]iving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, * * * it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce." 233 U.S. at 478. See also *ibid.* ("[T]he true [statutory] test is the nature of the work being done *at the time of the injury.*") (emphasis added). Thus, it was the use of the term "while"—not any doubt about the scope of the "engaging in commerce" language—that limited the reach of the revised FELA to less than Congress's full constitutional power. Had Congress not included the "while" provision in the revised FELA, the employee would have been covered by the statutory "engaging in commerce" provision.[4]

In Section 1 of the FAA, Congress did not include any "while" clause or temporal qualification. Accordingly, under *Behrens* and the other cases cited above, the "engaged in * * * commerce" language in Section 1 extended to the full reach of Congress's power over employment.[5]

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[4] The Court resolved any tension between its decision in *Behrens* and its decision in *Howard* by explaining that the defect in the first FELA was not that it included some employees who were not transporting items in commerce at the time of the accident, but that Congress had "attempted to regulate the liability of every carrier in interstate commerce * * * for any injury to any employee, even though his employment had no connection whatever with interstate commerce." 233 U.S. at 477.

[5] Petitioner makes a similar error in relying on *Shanks* v. *Delaware, Lackawanna & Western Railroad*, 239 U.S. 556, 558 (1916). In that case, the Court stated the test for coverage under the revised FELA as: "[W]as

c. In short, at the time Congress enacted the FAA, its Commerce Clause authority over employees extended no farther than to those "engaged in commerce."[6] Congress therefore used those terms in the FAA's Section 1 exclusion to express its intent to cover all of the employees it constitutionally could. No decision of this Court suggested that Congress's authority over employees extended beyond the "engaging in commerce" formulation.

The scope of the "engaging in commerce" language did expand gradually over time, as shown by *Pedersen*, *Seale*, and *Earnest*. See also, *e.g.*, *Southern Pac. Co.* v. *Industrial Accident Comm'n*, 251 U.S. 259, 262 (1920) (FELA applies to lineman repairing electrical line used by interstate and intrastate trains). Congress was surely aware of the decisions

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the employee at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" Petitioner asserts (Br. 18) that the Court thereby construed FELA's "engaging in commerce" language "to identify only a specific subcategory of workers falling within Congress' Commerce Clause authority." But the reason the test under the revised FELA applied only to transportation was not that the term "engaging in commerce" was so limited. It was, instead, the result of the fact that the revised FELA, by its terms, applied only to "every common carrier by railroad." That in no way suggests or supports an inference that the "engaging in commerce" language in the revised FELA—or the similar language in Section 1 of the FAA—was limited to transportation workers.

[6] Petitioner is correct (Br. 29) that Congress's Commerce Clause authority in 1925 was "not limited to 'employees who actually transported people or goods in interstate commerce.'" It could surely regulate common carriers in non-transportation businesses, such as telegraph and telephone companies. See *Howard*, 207 U.S. at 497. More importantly, Congress could regulate "the purchase, sale and exchange of commodities" in interstate commerce, as petitioner states (Br. 29), and business transactions "incident[] to" such activities. See *Stafford* v. *Wallace*, 258 U.S. 495, 516 (1922). Congress's Commerce Clause authority over employees and their relationship to employers, however, was narrower. *Hammer* v. *Dagenhart*, 247 U.S. 251, 272 (1918) ("The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof.").

expanding the scope of "engaging in commerce" when it enacted the FAA. Accordingly, by using the "engaged in * * * commerce" formulation in the Section 1 exclusion, Congress ensured that the exclusion expanded along with any expansions in Congress's Commerce Clause authority. There are no workers who Congress believed would be covered by the Section 2 coverage provision because their employment contracts "involv[ed] commerce," but whose work fell outside the "engaged in commerce" exclusion of Section 1.

d. Petitioner argues (Br. 15) that in cases decided after this Court's recognition of an expanded congressional Commerce Clause authority in the 1930's, the Court construed the term "engaged in commerce" to be narrower than the full scope of Congress's commerce power. Some of the cases cited construed statutes enacted after the 1930's, by which time the term "in commerce" had become a term of art. In *Russell* v. *United States*, 471 U.S. 858 (1985), for example, the Court noted, in construing the federal arson statute enacted in 1970, that "Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power." *Id.* at 859 n.4 (internal quotation marks omitted). By 1970, Congress was thus aware that "in commerce" denoted something less than Congress's full Commerce Clause authority. Nothing in *Russell* suggests that Congress in 1925 was aware of that meaning.

Similarly, in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), the Court construed the Fair Labor Standards Act provision covering employees satisfying two distinct standards—"engaged in commerce or in the production of goods for commerce." The Court held that "engaged in commerce" in that statute did not extend as far as the Commerce Clause. The Court relied on Congress's "deliberate and purposeful" express decision in 1938 to reject proposed "affecting commerce" language in favor of what by then were known to be

the two more specific categories. See *id.* at 493. Indeed, the Fair Labor Standards Act had been passed in the aftermath of this Court's landmark decision in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which first upheld an "affecting commerce" statute and made clear that "affecting commerce" provided a generally permissible basis for the exercise of the broadest reaches of Congress's Commerce Clause authority. See also *United States* v. *Darby*, 312 U.S. 100, 119-123 (1941); cf. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 544-551 (1935) (denying general "affecting commerce" authority). By that time, as the Court noted in *McLeod*, "[t]he distinction in the coverage arising from this choice of language was well known to Congress." 319 U.S. at 493 n.2 (citing, *inter alia*, *Jones & Laughlin*). *McLeod* does not suggest that a 1925 Congress would have been aware of the distinction.

Other cases cited by petitioner rely on the particular legal context of the statutory provision at issue. See *FTC* v. *Bunte Bros.*, 312 U.S. 349, 353, 351-352 (1941) (refusing to construe "in commerce" broadly, in reliance on 25-year history of narrow construction by Federal Trade Commission as "practical construction of the [statute] by those entrusted with its administration"). In *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), for example, the Court refused to construe the term "engaged in commerce" in Section 7 of the Clayton Act, 15 U.S.C. 18, to cover the whole scope of Congress's Commerce Clause power, based on the need to construe that provision harmoniously with the varying scope of related federal antitrust provisions. 422 U.S. at 276-279.[7] The same consideration

[7] Petitioner cites *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), as reaching the same narrow construction of "engaged in commerce." *Gulf Oil* involved three different "engaged in commerce" provisions in the antitrust laws. One of them was enacted in 1936, and the Court construed it narrowly based on the fact that the legislative record showed that Congress had deleted an "'effects on commerce' provision,

suggests the need to construe "engaged in * * * commerce" in the Section 1 exclusion harmoniously with "involving commerce" in the Section 2 coverage provision. Having construed "involving commerce" in the Section 2 coverage provision to expand with Congress's Commerce Clause authority, the Court should apply the same principle to "engaged in * * * commerce" in the Section 1 exclusion.

The Court also relied in *American Building Maintenance* on the fact that Section 7 of the Clayton Act was amended and reenacted in 1950. 422 U.S. at 279-280. Referring to amendments to Section 7 during reenactment and committee reports showing that Congress was "fully aware * * * that both the original and the newly amended versions of § 7 were limited to corporations 'engaged in commerce,'" the Court concluded that "the decision to re-enact § 7 with the same 'in commerce' limitation can be rationally explained only in terms of a legislative intent, at least in 1950, not to apply the rather drastic prohibitions of § 7 of the Clayton Act to the full range of corporations potentially subject to the commerce power." 422 U.S. at 281.

Contrary to petitioner's contention (Br. 30), nothing in the process of codifying—but *not* amending—the FAA in 1947, Act of July 30, 1947, ch. 392, § 2, 61 Stat. 670, shows any awareness of limitations in the "engaged in * * * commerce" language in Section 1 of the FAA.[8] At the time of

leaving only the 'in commerce' language." *Id.* at 200. The Court also noted that a broad interpretation would extend the statute "beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation." *Id.* at 201. Neither of those rationales would provide a basis to narrow the scope of the 1925 FAA. The Court did not resolve the proper construction of the other two provisions at issue in *Gulf Oil*, see *id.* at 201-202, although it addressed one of them later that Term in *American Building Maintenance*.

[8] See H.R. Rep. No. 255, 80th Cong., 1st Sess. 1 (1947) ("This bill takes each section of title 9 * * * and without any material change enacts each section into positive law. No attempt is made in this bill to make amendments in existing law."). Of course, because this Court did not construe

the codification, *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 882 (6th Cir. 1944), the only reported appellate decision on the subject, had held that the FAA did not apply to employment contracts. It was not until six years later that the first appellate decision held to the contrary. See *Tenney Eng'g, Inc.* v. *United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953). Moreover, while the Court in *American Building Maintenance* was concerned about a "drastic" expansion of the statute there, construing the Section 1 exclusion language to be as broad as the Section 2 coverage provision would not work any expansion of the FAA. To the contrary, in this case it is petitioner's construction of "engaged in * * * commerce" in Section 1 that would "drastically" expand the FAA to cover a controversial area—employment contracts—that Congress had no reason to believe was included in the statute it enacted in 1925.

Finally, the Court has regularly noted in cases construing the "engaged in" language that "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." *Bunte Bros.*, 312 U.S. at 353. See also *American Bldg. Maint.*, 422 U.S. at 277 ("The phrase 'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress."); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 (1974) ("The answer [to the meaning of 'engaged in commerce'] depends on the statutory language, read in light of its purposes and legislative history."). In the context of the FAA, the construction of "engaged in * * * commerce" in Section 1 should not depend on this Court's construction of other provisions in other statutes enacted in different contexts and

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the "involving commerce" language as extending to the full scope of Congress's Commerce Clause authority until almost 50 years later in *Allied-Bruce*, Congress could not have been aware of the potential problem that could be created by broadly construing "involving commerce" in the FAA's Section 2 coverage provision and then narrowly construing "engaged in * * * commerce" in the Section 1 exclusion.

with different histories and purposes. Rather, the "engaged in * * * commerce" language of Section 1 of the FAA should be construed in the same way that this Court has flexibly construed the cognate "involving commerce" language in Section 2, so that Congress's original intent not to include employment contracts in the FAA is preserved.

C. The Record Of The Proceedings Before Congress Establishes That Congress Understood The Terms "Involving Commerce" And "Engaged In * * * Commerce" To Be Coextensive

The FAA was originally drafted by a committee of the American Bar Association. See H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). See generally I.R. Macneil, *American Arbitration Law* 85-121 (1992) (discussing history of FAA). A bill embodying the ABA's draft was introduced in Congress in December 1922. H.R. 13522, 67th Cong., 4th Sess. (1922). It quickly attracted attention in labor circles, notably that of Andrew Furuseth, President of the International Seamen's Union. See M.W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 284 (1996). The Union and the American Federation of Labor immediately went on record against the bill's application to employment contracts, on the ground that the genuine consent to arbitrate disputes that was the backbone of commercial arbitration agreements was lacking when employees sign a take-it-or-leave-it employment contract with an arbitration provision. *Ibid.* As a union resolution stated, the bill "makes need, hunger and want, the basis of contracts which * * * a misused equity power will enforce." *Id.* at 284 n.14; cf. *Volt Info. Sciences, Inc.* v. *Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion."); *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395, 403 n.9 (1967) ("We note that categories of contracts otherwise within the Arbitration

Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1.").

On January 31, 1923, a Senate subcommittee held hearings on the bill. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) (*Senate Hearing*). Furuseth's concerns were echoed by Senator Walsh at the hearing:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. Take an insurance policy. * * * *It is the same with a good many contracts of employment.* A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate Hearing 9 (emphasis added). Those considering the legislation were concerned about the questions about consent that would arise upon application of the arbitration act to employment contracts.

Having apparently heard of labor's concerns with the bill, then-Secretary of Commerce Herbert Hoover wrote a letter to the subcommittee supporting the bill. Hoover's letter is the source of the exclusion in the FAA, and it explains its intended scope. The letter states that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Senate Hearing* 14. Secretary Hoover apparently believed that that language—which was adopted verbatim into the FAA—would address any

objection to "the inclusion of workers' contracts in the law's scheme." There was certainly no suggestion that it would exclude only some employment contracts, or that Congress should draft the exclusion narrowly to achieve that end.

Moreover, others shared Hoover's view. The chairman of the ABA committee that had drafted the legislation, W.H.H. Piatt, also testified before the subcommittee. In response to the question whether he had heard of objections by labor to the bill, he stated:

> [Mr. Furuseth] has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

Senate Hearing 9. Piatt's suggestion did not include the reference to railroad workers in Hoover's letter, and it substituted for the phrase Hoover suggested ("any other class of workers engaged in interstate or foreign commerce") a slightly different formulation ("any class of workers in interstate and foreign commerce"). But Piatt's suggestion nonetheless establishes that Congress was informed that the purpose of the FAA was to address commercial disputes among merchants and that a provision excluding "workers in

* * * commerce" would eliminate "any danger" that the FAA could be applied to "industrial arbitration" or "labor disputes."

No further action was taken on the FAA until the next Congress. Hearings were held in 1924 before a joint Senate-House committee on the FAA, as now amended to include Hoover's Section 1 exclusion. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. (1924). Although the exclusion was not further addressed in any detail, the basic explanation for the purpose and language of the exclusion was again made part of the record. The chairman of the committee submitted Hoover's letter at the hearing, *id.* at 19, and it therefore was published again as part of the hearing record. *Id.* at 21. The record of the Joint Hearing is replete with witnesses stressing the need for legislation to enforce arbitration agreements in commercial transactions, and no witness or statement suggests that employment contracts would be included. Indeed, with the elimination of employment contracts, "[t]here was no opposition to the bill before the committee." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).

This history shows that highly respected and legally sophisticated participants in the process of drafting and enacting the FAA were concerned that it would be construed to apply to employment contracts, and that they sought a formulation that would block such coverage. It shows that the "engaged in * * * commerce" formulation that Hoover proposed was presented to and accepted by Congress as an appropriate way to keep employment contracts out of the ambit of the FAA. That is potent evidence that Congress viewed the term "engaged in * * * commerce" in the Section 1 exclusion as sufficiently broad to eliminate whatever employment contracts might fall within the "involving commerce" term in Section 2.

II. THERE IS NO REASON NOT TO CONSTRUE THE TERMS IN THE SECTION 1 EXCLUSION IN ACCORD WITH THEIR ORDINARY MEANING

As the above discussion demonstrates, the plain meaning of the statutory terms is that the FAA's Section 1 exclusion for "any other class of workers engaged in * * * commerce" is coextensive with the Section 2 coverage provision; any employment contracts drawn into the statute by Section 2 are excluded by the plain meaning of that formulation in Section 1. Therefore, unless there is some other reason to construe Section 1 more narrowly than its plain terms indicate, the court of appeals' conclusion that employment contracts are not covered by the FAA is correct. The "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), does not suffice to narrow Section 1, both because the very question in this case is whether Congress wanted to exclude employment contracts from that policy by enacting the Section 1 exclusion and because that policy in any event could not overcome the plain statutory language and history.[9] An

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[9] Petitioner mistakenly relies (Br. 40) on the provision of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, providing that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged" to resolve federal discrimination cases. See also 42 U.S.C. 12212. The EEOC has long taken the position that postdispute agreements to employ alternative means of dispute resolution, including binding arbitration, should be fostered. The advisability of non-negotiated predispute agreements to arbitrate as a condition of employment, however, is far more controversial. Accordingly, the statutory provision on which petitioner relies carefully "encourage[s]" arbitration only "[w]here appropriate." See *Wright* v. *Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 n.2 (1998); see also H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 97, 104 (1991) (inadvisability of enforcing predispute agreements); H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 41 (1991) (predispute agreement in employment contract does not preclude Title VII claim in court). That provi-

examination of petitioner's other arguments demonstrates that there are in fact no sound bases to depart from the plain meaning rule in this case.

1. Petitioner contends that Section 1 excludes only employment contracts of transportation workers, see note 2, *supra*, and that all other employment contracts are covered by the FAA. There is, however, a logical flaw in petitioner's argument. Even if petitioner were correct that "the § 1 exclusion of employment contracts for workers 'engaged in commerce' must exclude a class of contracts well short of the overall sweep of the statute as defined by the broader language of § 2," Pet. Br. 16, it would not follow that employment contracts of transportation workers would be the class excluded. To the contrary, the accepted modern meaning of "engaged in commerce," even if narrower than the full sweep of the Commerce Clause, is to refer to "persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil*, 419 U.S. at 195; see also *United States* v. *Robertson*, 514 U.S. 669, 671-672 (1995) (per curiam) (defendant who purchased goods in California for use in Alaska mine, hired workers out of State and brought them to Alaska, and took mine output out of State "engaged in * * * commerce"); *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 213 (1959) (employees "engaged in" commerce where they "worked on plans and specifications" for facilities used for commerce). That obviously extends far beyond those employed in the transportation of goods.

Applying that formulation to this case would require affirmance of the judgment below. Respondent was employed by "a national retailer of brand-name consumer electronics and related products," Pet. Br. 4, that "distribut[es] to the

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sion does not—and could not—carry any weight in determining the scope of the FAA Section 1 exclusion enacted in 1925.

consumer." *Gulf Oil*, 419 U.S. at 195. Respondent is therefore a member of a "class of workers engaged in * * * commerce" under even the modern, post-1938 meaning of that phrase. Accordingly, petitioner's own arguments regarding the meaning of "engaged in * * * commerce," even if correct, would dictate that respondent—who is not a transportation worker—is within the Section 1 exclusion.

2. Petitioner's argument thus reduces simply to the proposition that the maxim of *ejusdem generis* should be applied to limit the formulation "seamen, railroad employees, or any other class of workers" to transportation workers. For the reasons given above, the concluding phrase ("engaged in foreign or interstate commerce") provides no support for the application of *ejusdem generis* here or the limitation of the exclusion to transportation workers. If *ejusdem generis* is to be applied, it must be for other reasons.

a. There is no sound reason for applying the maxim in this case. As this Court has explained, "[t]he rule of *ejusdem generis* * * * is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty" and it does "not require rejection of that sense of the words which best harmonizes with the context and the end in view." *United States* v. *Powell*, 423 U.S. 87, 91 (1975) (quoting *Gooch* v. *United States*, 297 U.S. 124, 128 (1936)). "That a word may be known by the company it keeps is * * * not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923). Like other similar maxims, *ejusdem generis* "may not be used to create but only to remove doubt." *Ibid.* See also *Powell*, 423 U.S. at 90 ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute.").

As explained above, there is no ambiguity in the Section 1 language—"seamen, railroad employees, or any other class of workers engaged in * * * commerce"—to which petitioner would apply *ejusdem generis*. Under that language, "[t]he Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,'" *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (ellipsis in original). The analysis thus need go no farther.

Indeed, this Court has held that it is "inappropriate to apply the rule of *ejusdem generis*" to quite similar "expansive" language. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). In *Harrison*, the Court was asked to apply *ejusdem generis* to limit the term "any other final action," as it appeared in an extensive list of administrative orders in Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1). After stating that it "discern[ed] no uncertainty in the meaning" of the language at issue, the Court held that "the phrase 'any other final action' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action." 446 U.S. at 588-589. The same principle applies here. See also *Garcia* v. *United States*, 469 U.S. 70, 73-75 (1984) (declining to apply *ejusdem generis* to construe "any money or other property" to refer only to postal money or property in phrase "any mail matter or * * * any money or other property of the United States").[10]

[10] Petitioner argues (Br. 22) that construing "any other class of workers" according to its plain terms would "simply excise the words 'seamen' and 'railroad employees' from FAA § 1." Literally, that is not true, for the concluding phrase applies only to "any *other* class of workers." Indeed, the addition of the word "other" is one of the differences between Hoover's formulation (which Congress adopted) and Piatt's formulation (which Congress did not) of the exclusion. In any event, this kind of listing, concluding with a broad term that could render the other terms superfluous, is ordinarily present in statutes, like those at issue in *Garcia* and *Powell*, to which the Court refuses to apply *ejusdem generis*.

b. At the very least, application of *ejusdem generis* requires the articulation of a persuasive reason why Congress would have wanted to achieve the narrowing result that application of the maxim would achieve; ordinarily, the reason is that a broad reading of a statutory phrase would "giv[e] unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[11] See also *Hughey* v. *United States*, 495 U.S. 411, 420 (1990) (applying *ejusdem generis* to avoid result that a "catchall phrase imports into the * * * provisions a wholly new substantive dimension not otherwise evident in the statute"); *Third Nat'l Bank* v. *Impac Ltd., Inc.*, 432 U.S. 312, 322-323 (1977) (noting numerous reasons, including *noscitur a sociis*, for adopting narrowing construction of statutory term and noting that "[n]o reason has been advanced" why Congress would have intended the broader reading of the statute).

In *Powell*, for example, the Court declined an invitation to limit the phrase "[p]istols, revolvers, and other firearms capable of being concealed on the person" in a criminal statute to exclude weapons not inherently concealable, such as a

[11] For example, in *Gustafson* v. *Alloyd Co.*, 513 U.S. 561 (1995), the Court applied the related doctrine of *noscitur a sociis* in interpreting the term "communication" in the statutory phrase "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." 15 U.S.C. 77b(10). The Court explained that "[f]rom the terms 'prospectus, notice, circular, advertisement, [or] letter,' it is apparent that the list refers to documents of wide dissemination." 513 U.S. at 575. Accordingly, the Court applied the narrowing maxim to limit the term "written communication" to "communications held out to the public at large," *id.* at 576, based in part on the conclusion that holding otherwise would "effect[] expansion of the coverage of the entire statute," *id.* at 578. See also *ibid.* ("It is not plausible to infer that Congress created this extensive liability for every casual communication between buyer and seller in the secondary market."). In this case, it is applying the doctrine of *ejusdem generis* that would substantially expand the FAA to include employment contracts; interpreting the statute according to its terms would permit the legislature (federal or state) to make the difficult policy decisions involved in applying the FAA to employment contracts.

sawed-off shotgun. 423 U.S. at 89 n.3. The Court found that the statutory purpose—"to make it more difficult for criminals to obtain concealable weapons," *id.* at 91—suggests the broader, not narrower, reading. In *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991), the Court explained that the canon "does not control * * * when the whole context dictates a different conclusion." On that basis and after an examination of the legal context and purpose of the statute in question, the Court declined to apply *ejusdem generis* and held instead that an exemption "from the antitrust laws and all other law, including State and municipal law" includes "a carrier's legal obligations under a collective-bargaining agreement." *Id.* at 127.[12]

In this case, applying *ejusdem generis* to limit the FAA Section 1 exclusion to employment contracts of transportation workers would achieve no discernible purpose other than to frustrate Congress's evident intent. The reasons advanced for the exclusion when it was drafted and added to the statute—in particular, the doubt about the integrity of an employee's consent to an arbitration clause likely imposed on a take-it-or-leave-it basis in an employment contract—are at least as applicable to other classes of workers as to transportation workers. Cf. *Prima Paint*, 388 U.S. at 403 n.9. Although it has been urged that an exclusion for transportation workers could be justified on the ground that statutes already in existence in 1925 provided for arbitration of at least some disputes of seaman and railroad workers, see *Tenney Eng'g, Inc.*, 207 F.2d at 452, that justification cannot explain the inclusion of other transportation workers, such

[12] See also *Gooch*, 297 U.S. at 128 (refusing to apply *ejusdem generis* to limit phrase "for ransom or reward or otherwise" in kidnapping statute to pecuniary motivations); *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 88-89 (1934) (refusing to exclude interest on tax refunds from scope of phrase "interest on bonds, notes, or other interest-bearing obligations" in tax statute).

as those working in the bus, truck, or even the nascent air transit industries. See M. Finkin, *supra*, 17 Berkeley J. Emp. & Lab. L. at 291 n.40 (noting that in 1926 there were 25,000 trucks and more than 3000 buses operating in interstate commerce); cf. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925) (claim by operator of interstate bus line to be relieved of state-law requirement).

Indeed, petitioner has a difficult time formulating a rationale for a transportation-worker-only exclusion. Petitioner notes (Br. 27) the theories that Congress simply "'rounded out' the exclusionary clause to cover similar transportation workers" after including seamen and railroad workers and that Congress "anticipated that other transportation workers * * * also would unionize and lobby successfully for protective legislation." Petitioner concludes (*ibid.*), however, that "[j]ust as likely, these additional groups of transportation workers were included simply to avoid any appearance of favoritism for selected 'special interests.'" The "rounding out" and "avoiding favoritism" theories, however, are not explanations for a transportation-worker-only exclusion; they are acknowledgements of the lack of any good reason why Congress would have wanted to write a statute that would be interpreted as petitioner suggests. Although Congress no doubt sometimes acts in that way, there is no reason to presume that it has, when the alternative explanation that Congress intended to exclude all employment contracts is both logically sound and well supported by the statutory language and the legislative record.

c. Finally, petitioner's expansion of the FAA to include most employment contracts would be particularly unwarranted, because it would oust the States from a part of their traditional authority over the employer-employee relationship. See *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). The States are well-equipped to adopt nuanced approaches, tailored to local settings and inclinations, to perceived abuses —as well as advantages—that might arise from enforcement

of arbitration agreements in the employment setting.[13] If there is any doubt that Congress intended generally to exclude employment contracts from the FAA, it would be inappropriate to apply *ejusdem generis* to expand the reach of the statute that far into what has been state territory. The better course would be to adopt a cautious interpretation of the FAA, leaving the States with their traditional authority over the employment relationship until Congress has more clearly expressed its intent to do otherwise.

Consideration of the relationship between the States and Congress at the time of the enactment of the FAA in 1925 demonstrates just how odd it would have been for Congress to have excluded all (and only) transportation workers from the FAA. Transportation workers were perhaps the only class of workers over whom Congress had reasonably secure Commerce Clause jurisdiction in 1925. To construe the statute as petitioner suggests would be to assume that Congress wanted to exclude from federal jurisdiction (and thus leave to the States) employment contracts of workers over whom it clearly had substantial regulatory authority, while bringing within the scope of federal law (and thus depriving the States of jurisdiction over) employment contracts of workers over whom it likely had no authority. This Court has applied *ejusdem generis* to avoid a perverse result; it has never applied that or other maxims to put in place a scheme as unusual as that suggested by petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[13] Since this case involves only state-law claims, affirmance would not present any question regarding the authority of the States to control the forum or forums intended by Congress for resolution of federal statutory claims.

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SEPTEMBER 2000

APPENDIX

1. Section 1 of Title 9 of the United States Code provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Section 2 of Title 9 of the United States Code provides:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC., *Petitioner,*
v.
SAINT CLAIR ADAMS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Employers Group is a nonprofit corporation headquartered in the State of California. With nearly 5,000 member companies employing approximately 2.5 million employees, the Employers Group is the nation's oldest and largest human resource management association. Its purpose is to educate its members about employment law and keep them informed of employment issues. In addition, the group routinely represents the interests of its members in the legislative process and files briefs *amicus curiae* in cases in which those interests are implicated.

Many of the Employers Group's member companies have agreed in contracts of employment to arbitrate disputes with their employees. These arbitration agreements enable both employers and employees alike to avoid the expense of litigation. Just as importantly, these agreements also help to promote and preserve cooperative, productive working environments by resolving disputes quickly before they create permanent mistrust and estrangement.

California has long been hostile to the enforcement of arbitration agreements in the employment area. This Court has already held that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, preempts a California law barring arbitration of wage disputes, *see Perry v. Thomas*, 482 U.S. 483 (1987); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (holding that the FAA preempts application of a California law concerning franchise investments), and the California legislature recently considered legislation prohibiting employers from even requesting an agreement to arbitrate in most employment contracts (and rendering any such agreements

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[1] Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amicus* and its counsel has made any monetary contribution to the preparation and submission of this brief.

unenforceable).[2] Arbitration agreements in employment contracts have also repeatedly been attacked in California courts as unconscionable contracts of adhesion and as contrary to public policy. *See, e.g., Kinney v. United HealthCare Serv.*, 70 Cal. App. 4th 1322 (1999) (unconscionable); *Stirlen v. Supercuts*, 51 Cal. App. 4th 1519 (1997) (unconscionable and contrary to public policy). In fact, the California Supreme Court is currently considering an unconscionability claim in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 973 P.2d 51 (Cal. 1999), and it has deferred consideration of a number of similar claims pending its ruling in that case.[3] As a consequence, if this Court were to find that all contracts of employment are excluded from the coverage of the FAA, many agreements to arbitrate involving the Employers Group's member companies could become unenforceable. Because of the importance of this issue to its members and to the country as a whole, the Employers Group has a vital interest in the question presented in this case.

INTRODUCTION AND SUMMARY

Ten years ago, several *amici* questioned whether the FAA applies to any employment contracts. *See Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991). Such contracts, the *amici* argued, are not covered by the FAA because they fall within the exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" in

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[2] *See* A.B. 858, 1999-2000 Reg. Sess., § 2 (Cal. May 3, 1999) <http://www.leginfo.ca.gov/pub/bill/asm/ab_0851-0900/ab_858_bill_20000124_amended_sen.pdf>.

[3] *See, e.g., Ramirez v. Circuit City Stores, Inc.*, 995 P.2d 137 (Cal. 2000); *Maciejewski v. Alpha Sys. Lab, Inc.*, 986 P.2d 170 (Cal. 1999); *Pichly v. Nortech Waste*, 986 P.2d 169 (Cal. 1999); *Lee v. Technology Integration Group*, 978 P.2d 1 (Cal. 1999); *Gonzales v. Hughes Aircraft Employees Federal Credit Union*, 978 P.2d 1 (Cal. 1999).

Section 1 of the Act. 9 U.S.C. § 1. Although this Court decided to "leave for another day the issue raised by *amici curiae*," *Gilmer*, 500 U.S. at 25 n.2, eleven circuits and one state supreme court have since determined or reaffirmed that this exclusion covers only contracts of individuals employed in the interstate or international transportation of goods and people.[4] Indeed, the Ninth Circuit is the only circuit considering the issue after *Gilmer* to find that the contract-of-employment exclusion covers all employment contracts.

The Ninth Circuit adopted this anomalous position in a 1999 decision captioned *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), which the *per curiam* decision below followed without comment. *See Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131, 1132 (9th Cir. 1999). While most courts have focused on the language of the exclusion in Section 1, in *Campbell Soup* the Ninth Circuit took a different tack. It focused upon history, arguing that an expansive reading of the exclusion is supported by the historical understanding of its language, the historical scope of Congress' commerce power, and the Act's legislative history. *See* 177 F.3d at 1084-90. As demonstrated below, these historical arguments are irrelevant because the meaning of the text of the exclusion is plain. In

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[4] *See Brennan v. King*, 139 F.3d 258, 264 n.5 (1st Cir. 1998); *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-36 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998)(op. of Cox, J. and Tjoflat, J.); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Brown v. KFC Nat'l Management Co.*, 921 P.2d 146, 156 & n.13 (Haw. 1996).

addition, the historical arguments are without merit. First, there is no material difference between the current understanding of the language of the exclusion and the understanding in 1925 when the FAA was first enacted. Second, even in 1925, the commerce power was not as circumscribed as the Ninth Circuit suggested in *Campbell Soup*. Finally, the legislative history is ambiguous and contradictory, and it therefore fails to provide a basis for departing from the plain language of the contract-of-employment exclusion.

ARGUMENT

I. THE FAA COVERS EMPLOYMENT CONTRACTS OF PERSONS NOT INVOLVED IN INTERSTATE OR INTERNATIONAL TRANSPORTATION.

Although the Ninth Circuit holds that the Federal Arbitration Act does not apply to any contracts of employment, neither the decision below nor the *Campbell Soup* opinion actually analyzes the language of the contract-of-employment exclusion. This is not surprising: that language clearly does not cover all employment contracts. Moreover, contrary to the suggestion in *Campbell Soup*, Section 2 of the FAA does not indicate otherwise. Indeed, that section supports the more limited reading of the exclusion that every other court of appeals to consider the question has adopted.

A. The Contract-of-Employment Exclusion Covers Only Contracts of Individuals Engaged in Interstate or International Transportation.

The final sentence of Section 1 of the FAA provides:

> nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. As the heading of Section 1 suggests, and the context makes clear, this passage does not simply limit the

definitions of "maritime transactions" and "commerce" in the rest of Section 1; the exclusion limits the application of the statute as a whole. *See Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines*, 192 F.2d 310, 312 (3d Cir. 1951) (noting that the heading was enacted into positive law in 1947). Even more pertinently, under well-settled rules of statutory interpretation, this exclusion does not encompass all contracts of employment, but is instead limited to contracts governing the employment of individuals engaged in the interstate or international transportation of goods and people.

As this Court recently reiterated, "[s]tatutory language must be read in context" because "a phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999) (quotation omitted); *see also Neal v. Clark*, 95 U.S. 704, 708 (1877) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be interpreted by reference to that which precedes and follows it.") (quotation omitted). As a consequence, when words in a statute are "grouped in a list," those words "should be given related meaning." *Third Nat'l Bank in Nashville v. Impac, Ltd.*, 432 U.S. 312, 322 (1977). And when a statutory list contains several specific terms followed by a general one, it has long been recognized that "the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. United States*, 522 U.S. 398, 404 n.2 (1998) (quotation omitted); *see also Cleveland v. United States*, 329 U.S. 14, 18 (1946) (noting that "general words are confined to the class and may not be used to enlarge it"); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that this principle "limits general terms which follow specific ones to matters similar to those specified"); *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 48-49 (1925) (same).

This principle, which is often referred to as the "*ejusdem generis*" or "of the same kind" rule, is based upon a sound,

practical consideration: if the general term in a list is construed to its widest extent, it may render the more specific terms preceding it superfluous. It is, however, a "cardinal principle of statutory construction" that, unless absolutely necessary, courts must not ignore any portion of a statute or render it meaningless; instead, they must "give effect, if possible, to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (quotation omitted); *see also Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997). Accordingly, when a general term is preceded by specific terms encompassed by that term, under the *ejusdem generis* principle, the general term is normally interpreted to embrace only objects similar in scope to the specific terms. *See* 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 272-74 (6th ed. 2000). In this way, both the specific and the general terms are given meaning because the specific terms define the class to which the general term extends. *See id.* at 283-85.

The *ejusdem generis* principle plainly applies to the FAA's contract-of-employment exclusion. That exclusion contains a list in which specific terms ("seamen" and "railroad employees") precede a general term ("any other class of workers engaged in foreign or interstate commerce"), and, as several courts of appeals have noted, if the general term in the exclusion were interpreted to extend to its fullest scope, it would "rob the rest of the exclusion clause of all significance." *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (quotation omitted); *accord Cole v. Burns Int'l. Sec. Serv.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997); *Asplundh Tree Expert v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

Two additonal considerations support application of the *ejusdem generis* principle here. First, the exclusion does not simply refer to "any class of workers engaged in foreign or interstate commerce"; it refers to "any *other* class of workers

engaged in foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), thereby indicating a limitation on the scope of the excluded class that is linked to the workers previously enumerated in the exclusion. Second, the exclusion carves out an exception to social legislation and must therefore be narrowly construed. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993); *A.H. Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945). Thus, under the *ejusdem generis* principle, the exclusion's reference to "any other class of workers engaged in foreign or interstate commerce" should be read in light of the prior references to "seamen" and "railroad workers" to extend only to the class of workers typified by seamen and railroad workers, that is, to workers involved in the transportation of goods and persons in interstate and foreign commerce.

It is, of course, true that the *ejusdem generis* principle is only a rule of construction used in ascertaining the intent of Congress and that it "may not be used to defeat the obvious purpose of legislation." *Gooch*, 297 U.S. at 128. A narrow reading of the exclusion, however, furthers rather than defeats the goal of the FAA. The Act was intended primarily to "ensure judicial enforcement of privately made agreements to arbitrate" and secondarily to "promote the expeditious resolution of claims" without the "costliness and delays of litigation." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (quotation omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) (noting the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements"). Application of the *ejusdem generis* rule furthers both of these goals because it narrows the scope of the exclusion for contracts of employment, thereby ensuring that more agreements to arbitrate will be enforced and more costly litigation avoided in spite of any state laws hostile to arbitration. *Cf. Southland*, 465 U.S. at 16 (holding that the FAA preempts "state

legislative attempts to undercut the enforceability of arbitration agreements").

Moreover, it makes good sense to apply the FAA to contracts of employment. Arbitration gives parties the flexibility to choose decisionmakers with specialized expertise that judges may lack and to tailor procedures to particular disputes. *See, e.g.*, James A. King *et al.*, *Agreeing to Disagree on EEO Disputes*, 9 Lab. Law. 97, 100 (1993); *see also Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes*, 9A Lab. Rel. Rep. (BNA) No. 142, at 534:401 (May 9, 1995) (recommending procedures for arbitrating employment disputes involving statutory rights). Just as importantly, because arbitration is quicker and cheaper than litigation, it is more accessible to employees and more economical for employers, and it avoids much of the psychological stress and reputational harms associated with litigation that can poison the employment relationship. *See, e.g.*, David Sherwyn *et al.*, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bathwater, and Constructing a New Sink in the Process*, 3 U. Penn. J. Lab. & Emp. L. 73, 81-82, 91-99 (1999); King, *Agreeing to Disagree*, 9 Lab. Law. at 99-101. Indeed, it is because of these many advantages that arbitration has become "the primary mechanism for resolving disputes arising under collective bargaining agreements." 1 Patrick Hardin, *The Developing Labor Law* 1008 (3d ed. 1992).

In addition, Congress had good reason to exclude seamen and railroad workers from the FAA. While the Act makes agreements to arbitrate future disputes as well as any resulting awards enforceable, *see* 9 U.S.C. §§ 2, 13, earlier statutes treated seamen and railroad workers differently. One statute made certain arbitration agreements between seamen and their employers voluntary for seamen, *see* 46 U.S.C. § 651; *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925), and while a second statute made arbitration mandatory for employment

disputes involving railroads, it provided no mechanism for enforcement. *See* Transportation Act of 1920, 41 Stat. 456, 469-74 (1920); Douglas L. Leslie, *The Railway Labor Act* 36-37 (1995).

Ignoring these considerations, the Ninth Circuit argued in *Campbell Soup* that a narrow interpretation of the contract-of-employment exclusion makes little sense because transportation workers besides railroad workers and seamen were not subjected to any statutory dispute resolution scheme in 1925. *See* 177 F.3d at 1092. However, as Chief Judge Posner pointed out, Congress may have anticipated that modes of transportation such as airplanes and motor carriers would, when they matured, be subjected to comprehensive regulation. *See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997).[5] In any event, there is no rule requiring that exceptions to economic legislation be narrowly tailored to the same broad principle. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970). Indeed, Congress can, and does, carve out statutory exceptions based on no principle beyond political

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[5] Citing a law review article, the Ninth Circuit asserted that motor transportation was already "a critical subject of Congress' interstate commerce power" in 1925. *See Campbell Soup*, 177 F.3d at 1092 (citing Matthew W. Finkin, *"Workers' Contracts" under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 291(1996)). That article, however, says only that "[t]he interstate transportation of goods and passengers by motor carrier was not an insignificant part of interstate commerce," Finkin, *Workers' Contracts*, 17 Berkeley J. Empl. & Lab. L. at 291, and while it asserts that the "visibility of these enterprises politically was heightened by the legal contest over their regulatory status at the time," *id.* at 291 & n.40, it cites only a decision of this Court applying the dormant commerce clause to state regulation of interstate carriers in support of that assertion. *See id.* (citing *Buck v. Kuykendall*, 267 U.S. 307 (1925)). Moreover, according to an authority cited by the article, no federal regulation of interstate carriers had even been proposed when the FAA was debated and enacted. *See* John J. George, *Motor Carrier Regulation in the United States* 234-46 (1929).

influence and power. As a consequence, the Ninth Circuit's criticism provides no justification for refusing to apply the *ejusdem generis* principle to the contract-of-employment exclusion.

B. Section 2 of the FAA Supports a Narrow Interpretation of the Exclusion.

In *Campbell Soup*, the Ninth Circuit argued that Section 2 of the FAA supports an expansive interpretation of the contract-of-employment exclusion because that section does not cover contracts of employment. *See* 177 F.3d at 1084-85. In fact, just the opposite is true: Section 2 covers contracts of employment, and it supports a narrow interpretation of the contract-of-employment exception.

The Ninth Circuit's reading of the contract-of-employment exclusion cannot be reconciled with the structure of the FAA. As this Court has recognized, Section 2 is the "primary substantive provision" of the Act, *Gilmer*, 500 U.S. at 24, and the other portions of the Act are therefore interpreted in light of the limitations upon the scope of Section 2, *see Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956). Consequently, if Section 2 did not cover contracts of employment, the contract-of-employment exclusion in Section 1 would be superfluous. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967). As a "cardinal principle of statutory construction is to save and not to destroy," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), the Ninth Circuit's interpretation must be rejected unless it is compelled by the plain language of the statute.

The language of Section 2 is, however, more than broad enough to encompass contracts of employment. By its terms, Section 2 applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The term "transaction" can refer to any "communicative action or activity involving

two parties or two things reciprocally affecting or influencing each other." *Webster's Third New Int'l Dictionary* 2425 (1971); *see also American Heritage Dictionary of the English Language* 1899 (3d ed. 1992) (defining "transaction" to include any "[c]ommunication involving two or more people that affects all those involved"). Because the parties to an employment contract exchange mutually binding promises, thereby "reciprocally affecting or influencing each other," employment contracts fit comfortably within the definition of "transaction."

In *Campbell Soup*, the Ninth Circuit reached a different conclusion based upon the supposed understanding of the word "transaction" in 1925 when the FAA was passed. According to the court of appeals, at that time the word "transaction" referred only to "business deals" or to acts "involving buying and selling." 177 F.3d at 1085. An employment contract *is*, however, a sort of business deal. Even more importantly, in 1925, the term "transaction" had a much broader meaning than the Ninth Circuit admits. Although the term could be used to apply to the buying and selling of goods, it also applied more generally to "the doing, performing or carrying out of *anything*." *The International Encyclopedia Dictionary* 4150 (1901) (emphasis added); *see also* Noah Webster, *An American Dictionary of the English Language* 1166 (C. Goodrich rev. ed. 1859) (defining "transaction" to mean "[t]he doing or performing of any business" or "management of any affair"); *A Standard Dictionary of the English Language* 1915 (1903) ("the conduct or management of *any* undertaking or business affair") (emphasis added). Moreover, in legal usage, the term referred to "[w]hatever may be done by one person which affects another's rights, and out of which a cause of action may arise." Henry C. Black, *A Law Dictionary* 1166 (2d ed. 1910). Thus, the Ninth Circuit's reliance on the historical understanding of the term is misplaced because even in 1925, Section 2's reference to "transaction" could easily have been interpreted to encompass contracts of employment.

II. EVEN IN 1925, THE EXCLUSION DID NOT COVER ALL EMPLOYMENT CONTRACTS SUBJECT TO CONGRESSIONAL REGULATION.

In *Campbell Soup*, the Ninth Circuit argued that the FAA should not be interpreted to cover any contracts of employment now because the statute did not reach such contracts when it was enacted in 1925. *See* 177 F.3d at 1086-88. According to the Ninth Circuit, at that time Congress' power to regulate pursuant to the Commerce Clause was "limited to employees who actually transported people or goods in interstate commerce." *Id.* at 1087. Since Section 1 excludes employment contracts involving such individuals, the Ninth Circuit reasoned that Congress did not intend the FAA to apply to any employment contracts and that the Act should not be interpreted to cover any employment contracts under the more expansive Commerce Clause power now recognized. *See id.* at 1087-88. This argument suffers from three defects.

First, the Ninth Circuit's argument ignores the language of the exclusion. As other courts of appeals have recognized, if Congress had intended to exclude all employment contracts from the FAA, it "could simply have said 'nothing herein shall apply to contracts of employment.'" *Cole*, 105 F.3d at 1471-72; *accord O'Neil*, 115 F.3d at 274; *Rojas*, 87 F.3d at 748. Section 1, however, provides that "nothing herein contained shall apply to contracts of employment *of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). In light of the cardinal rule that courts must "avoid a reading which renders some words altogether redundant," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995), these additional words of limitation cannot be ignored and the exclusion therefore cannot be interpreted to reach all employment contracts.

Second, the argument incorrectly assumes that when Congress enacted the FAA, it viewed its power to regulate

arbitration agreements in employment contracts as limited to the area of interstate and international transportation.

This assumption is based on this Court's interpretation of the scope of the Commerce Clause prior to 1937. *See Campbell Soup*, 177 F.3d at 1086-87. Congress did not, however, rely solely upon the Commerce Clause in enacting the FAA. As Justice O'Connor has demonstrated, when it passed the FAA, "Congress thought it was exercising its power to dictate either procedure or 'general federal law' in federal courts." *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting); *see also* H.R. Rep. No. 68-96, at 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . ."). While this view proved incorrect—this Court later held that the duty to arbitrate is substantive rather than procedural, *see Bernhardt*, 350 U.S. at 202-04, and that there is no general federal common law, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)—Congress' reliance on its supposed power to prescribe procedure and general federal common law nonetheless undermines the Ninth Circuit's assumption that Congress doubted its power to include employment contracts outside the transportation sector in the FAA.

In any event, even in 1925 Congress's authority under the Commerce Clause was far broader than the Ninth Circuit assumed. Although during this period this Court sometimes characterized certain economic activities as beyond the scope of Congress' power under the Commerce Clause, *see, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941), its decisions in the period were "not marked . . . by a coherent or consistent course of interpretation." *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *see generally* Robert L. Stern, *The Commerce Clause and the National Economy, Part I*, 49 Harv. L. Rev. 645, 647-53 (1946).

Even more importantly, this Court has never suggested that commerce was limited to transportation. To the contrary, by 1925 it was well settled that interstate commerce "includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899); *see also Real Silk Hosiery Mills v. Portland*, 268 U.S. 325, 335 (1925) ("The negotiation of sales of goods which are in other States, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.") (quotation omitted). Moreover, by 1925 transportation was not the only "instrumentality" of commerce recognized by this Court: nearly fifty years before that time, this Court recognized that telegraphs were also instrumentalities of commerce. *See Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1877). Thus, under any interpretation of the Commerce Clause, Congress' authority stretches beyond interstate transportation to encompass interstate communications as well as the buying and selling of goods across state lines.

Although Congress did not attempt in 1925 to regulate employment in these areas, it had clear authority to do so. According to the decisions of this Court at the time, Congress' power to regulate under the Commerce Clause extended to "every instrument and agent by which such commerce is carried on," and the men who performed or made possible the various "act[s] of interstate commerce" were treated as "agents . . . of commerce" subject to congressional regulation. *In re Second Employer's Liab. Cases*, 223 U.S. 1, 47-48 (1912). Consequently, in 1925 Congress possessed recognized authority under the Commerce Clause to enact legislation concerning the "conditions under which those agents . . . perform the work of interstate commerce" so long as that legislation had a "real or substantial connection with the interstate commerce." *Id.* at 48-49; *see also First Employer's Liab. Cases*, 207 U.S. 463, 495 (1908) (noting that Congress

has the "power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on the subject are solely confined to interstate commerce"). Thus, the employment of individuals engaged in interstate sales and interstate communications was every bit as subject to regulation by Congress as the employment of individuals engaged in interstate transportation.

Third, there is no reason to assume that Congress intended the contract-of-employment exclusion to expand in tandem with Section 2. The Ninth Circuit's opinion assumes that, if Section 1 excluded all employment contracts in 1925, it should continue to exclude all employment contracts covered by that Section despite the subsequent liberalization of this Court's interpretation of the Commerce Clause. Statutory exceptions are, however, generally interpreted narrowly. *See supra* p. 7. Even more importantly, the language of Section 2 is broader than the language of the contract-of-employment exclusion. Section 2 covers any written arbitration provision in "a contract evidencing a contract involving commerce." 9 U.S.C. § 2. As this Court has recognized, this section's reference to transactions "involving commerce" is "broader than the often-found words of art 'in commerce,'" and therefore "cover[s] more than only persons or activities within the flow of interstate commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (quotation omitted). As the exclusion refers only to employees "engaged *in* foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), it is plainly more limited. Thus, even if the exclusion had covered all employment contracts that Congress could have regulated in 1925, it would by no means follow that the exclusion should continue to be read to cover all employment contracts covered by the more broadly worded Section 2.

III. THE LEGISLATIVE HISTORY OF THE FAA IS IRRELEVANT AND, IN ANY EVENT, CANNOT SUPPORT THE INTERPRETATION BELOW

In *Campbell Soup*, the Ninth Circuit asserted that the legislative history of the FAA supports its expansive reading of the contract-of-employment exclusion. *See* 177 F.3d at 1089-90. The legislative history is, however, irrelevant because where, as here, the language of the statute is unambiguous, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). In any event, unlike the language of the exclusion, the legislative history is ambiguous and confused.

A. The Legislative History Is Irrelevant Because the Meaning of the Language of the Exclusion Is Plain.

As this Court has repeatedly recognized, the best evidence of Congress' intent is "the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Accordingly, courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Instead, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quotation omitted). As demonstrated above, the text of the FAA's contract-of-employment exclusion belies any suggestion that all contracts of employment are excluded from the Act. Instead, the plain language of Section 1 shows that the exclusion covers only contracts of employment of individuals such as railroad workers and seamen who are engaged in the interstate and international movement of goods and persons. *See supra* pp. 4-12. As there is no suggestion of any extraordinary circumstances justifying disregard of this plain meaning, there

is no need even to address the legislative history of the exclusion.

B. In Any Event, the Legislative History Does Not Justify an Expansive Interpretation of the Exclusion.

The legislative history of the FAA offers little, if any, support for the Ninth Circuit's expansive interpretation of the exclusion. The legislative history as a whole is sparse, and in the little legislative history that exists, there is almost no mention of the contract-of-employment exclusion. Moreover, "[a]s is so often the case," the historical materials that exist "cut[ ] both ways." *Department of the Air Force v. Rose*, 425 U.S. 352, 388-89 (1976) (Blackmun, J., dissenting). As a consequence, the legislative history offers no basis for disregarding the plain language of the exclusion.

1. There Is No Material Discussion of the Exclusion in the Legislative History.

The legislative history of the FAA is limited. As two commentators noted shortly after the Act was passed, it is "remarkable how so important and far reaching legislation can emerge from Congress with such a dearth of intelligent discussion." Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. Rev. 428, 430 n.121 (1932). The bills that became the Federal Arbitration Act, or the "United States Arbitration Act" as it was originally titled (*see* 43 Stat. 883, 886 (1925)), were introduced in December 1923. *See* S. 68-1005 (1923); H.R. 68-646 (1923). After House and Senate subcommittees of the respective judiciary committees held a joint hearing on the bills the next month, *see Arbitration of Interstate Commercial Disputes, Hearing on H.R. 646 and S. 1005 before the Joint Comm. of Subcommittees on the Judiciary*, 68th Cong., 1st Sess. (1924) (memorandum from Julius Henry Cohen) [hereinafter "1924 Joint Hearing"], the

two committees issued short (two- and four-page) reports on the bills, *see* H.R. Rep. No. 68-96 (1924); S. Rep. No. 68-536 (1924), which were then passed unanimously by both Houses without any substantive debate, *see* 66 Cong. Rec. S2759-62 (1925); 65 Cong. Rec. H11080-82 (1924).

Even more pertinently, as one of the Ninth Circuit's own authorities concedes, there is "virtually no official legislative history" concerning the contract-of-employment exclusion. Matthew W. Finkin, *Employment Contracts under the FAA—Reconsidered*, 48 Lab. L.J. 329, 329 (1997). Neither of the committee reports mentions the exclusion, much less explains its purpose or scope. There is no mention of the exclusion in the little discussion of the Act that occurred on the House and Senate floors. And none of the witnesses at the joint hearing discussed it. Indeed, the only mention of the exclusion in all of the legislative history of the bills that became the FAA is in one sentence of one of the letters reprinted in the transcript of the joint hearing. *See* 1924 Joint Hearing 21 (reprinting a January 31, 1923 letter from Herbert Hoover to Senator Thomas Sterling).

In purporting to rely upon the legislative history of the FAA, the Ninth Circuit in *Campbell Soup* looked to testimony at a 1923 hearing before a subcommittee of the Senate judiciary committee concerning a precursor of the FAA introduced in the prior Congress. *See Campbell Soup*, 177 F.3d at 1089-90 (discussing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing before Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) [hereinafter "1923 Senate Hearing"]). Although members of this Court have consulted those hearings before, *see Gilmer* 500 U.S. at 39 (Stevens, J., dissenting); *Southland*, 465 U.S. at 25 n.7, 27 n.12 (O'Connor, J., dissenting), the testimony at those hearings is of limited value. Such testimony reflects the views of the witnesses, not the views of the members of Congress who

enacted the legislation in question. Accordingly, this Court has repeatedly held that testimony of this sort deserves "little weight." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976); *see also Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) ("declin[ing] to accord any significance to these statements" of witnesses at hearings); *McCaugh v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) (characterizing such statements as "without weight").

One commentator has suggested that the FAA should be interpreted differently because the bills that became the FAA were proposed by an American Bar Association committee in 1922 and enacted with only minor revisions. *See* Ian R. MacNeil, *American Arbitration Law* 107-09 (1992); *see generally id.* at 83-101 (discussing the ABA's successful campaign to enact the FAA). According to this commentator, the FAA was really a "legislation of adhesion," and therefore "if we wish to ascertain Congress's intention and purpose, our focal point must be what Congress understood to be the goals of those presenting the fully drafted statute." *Id.* at 108.

There are two flaws in this argument. First, the contract-of-employment exclusion was not part of the ABA's original proposal in 1922; it was instead proposed at the 1923 hearing before the Senate Judiciary Committee in response to criticism from the head of the International Seamen's Union. *See* 1923 Senate Hearing at 9; MacNeil, *American Arbitration Law* 89-91. Moreover, even though the witness making this later proposal was an ABA official, the ABA's position on the exclusion was not consistent. As explained more fully below, *see infra* pp. 23-25, although the witness who initially proposed the exclusion asserted that the FAA was not intended to be an "act referring to labor disputes at all," 1923 Senate Hearing at 9, the ABA committee that proposed the FAA in 1922 later stated that it had "originally favored the application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy." 53

ABA Reports 351 (1928). Thus, even if the intent of the ABA were relevant in general under the "legislation-of-adhesion" theory, it is by no means clear that its intent concerning the exclusion would be.

Second, whether or not Congress simply adopted the views of the ABA, it would be both improper and unfair to base an interpretation of the FAA on testimony at the 1923 Senate hearing. There were only three senators present at that hearing, *see* 1923 Senate Hearing at 1, and while the transcript of the hearing was presumably distributed to members of Congress, there is no mention of that hearing in the legislative history of the FAA. Indeed, all three witnesses who testified in 1923 before the Senate judiciary committee reappeared in 1924 at the joint hearing before subcommittees of the judiciary committees of both Houses and for the most part repeated their prior testimony. *See* MacNeil, *American Arbitration Law* 92-93. As a consequence, an ordinary citizen seeking to determine the meaning of the FAA would have no way of knowing about the Senate hearing in 1923, much less a reason to suspect that the testimony by a witness at that hearing would define the meaning and scope of the exclusion in Section 1 of the FAA. Indeed, the authors of one of the most comprehensive earlier law review articles on the FAA were unaware of the 1923 Senate hearing and therefore described the contract-of-employment exclusion as "curious as it is unaccounted for in any discussion." Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements*, 8 N.Y.U. L.Q. Rev. at 435. In short, the 1923 Senate hearings constitute a form of secret history that has no place in a truly democratic system.

In its *amicus* brief in *Gilmer*, the AFL-CIO wandered even further afield, citing the proceedings from its own convention in 1925 and that of the International Seamen's Union two years before. *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner, *Gilmer v. Interstate/Johnson Lane*

Corp., No. 90-18, at 10-24 (U.S. Nov. 15, 1990) [hereinafter "AFL-CIO Br."]. This Court has, however, consistently held that material outside the legislative process, whether or not contemporaneous, has little relevance. *See, e.g., Gustafson*, 513 U.S. at 580 ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."); *see also Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 n.* (1987) (noting that "the *post hoc* statements of interested onlookers [are] entitled to no weight"). Indeed, construing the FAA based upon statements by union leaders at their national conventions is a little bit like construing a nuclear energy bill in light of a speech by Ralph Nader before a Green Party convention. In any event, as one of the Ninth Circuit's own authorities concedes, there is no evidence suggesting that anyone in Congress relied upon the materials cited by the AFL-CIO. *See* Finkin, *Workers' Contracts*, 17 Berkeley J. Emp. & Lab. L. at 295 n.61. Thus, the historical materials upon which the Ninth Circuit relied in *Campbell Soup* have no value.

2. The Historical Materials Cited by the Ninth Circuit and Supporters of Its Interpretation Are Confused and Ambiguous

Even taken at face value, the historical materials cited by the Ninth Circuit and other supporters of a broad interpretation of the contract-of-employment exclusion are far too confused and ambiguous to provide a basis for interpreting the exclusion.

1. In *Campbell Soup*, the Ninth Circuit relied upon the 1923 Senate hearing and an amendment to Section 2 of the Act. *See* 177 F.3d at 1089-90. The ABA's 1922 proposal, which was introduced in Congress in December 1922, made any written arbitration provision in a "contract or maritime transaction or transaction involving commerce" valid, irrevocable, and enforceable. S. 67-4214 § 2 (1922); *accord* 47 ABA Reports 315 (1922). Ultimately, however, Section 2 was revised to refer to written arbitration provisions in "any

maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Assuming that this amendment was made in response to the protests of the International Seamen's Union, the Ninth Circuit concluded that Congress amended Section 2 to make clear that the FAA did not apply to any contracts of employment. *See Campbell Soup*, 177 F.3d at 1089-90.

In fact, the amendment of Section 2 was entirely independent of the response to the seamen's protest. The contract-of-employment exclusion was included in the arbitration bills introduced in 1923. *See* S. 68-1005 § 1; H.R. 68-646 § 1; *see also* 48 ABA Reports 287, 302 (1923) (noting that the ABA consented to the contract-of-employment exclusion in response to the seamen's protest). Although those bills contained an amended Section 1 thta included the exclusion, the language of Section 2 remained the same. *See* S. 68-1005 § 2; H.R. 68-646 § 2; *accord* 48 ABA Reports 302. Moreover, there was no mention of an amendment to Section 2 in the January 1924 joint hearing, and the House bill was enacted without the amended Section 2. *See* 65 Cong. Rec. H11081-82.

According to a letter from the chairman of the ABA committee that proposed the FAA, the amendment to Section 2 was suggested by a senator absent from the January 1924 joint hearing sometime after that hearing. *See* Letter from W.H. Piatt to Hon. Thomas J. Walsh, March 7, 1924, *reprinted in* 49 ABA Reports 283-84 (1924); *see also* 1924 Joint Hearing at 1 (noting that "Senator Walsh, of Montana, is detained at another hearing"). In addition, when this amendment was considered by the House, it was not treated as substantive. *See* 66 Cong. Rec. H3004 (Feb. 4, 1925). Moreover, far from disagreeing, the ABA committee stated that the change was a technical one, a simple "improvement in the language of the legislation." Letter from Piatt to Walsh, March 7, 1924, *reprinted in* 49 ABA Reports 283. Thus,

contrary to the Ninth Circuit's suggestion, the historical materials do not suggest that the amendment to Section 2 had anything to do with the contract-of-employment exclusion.

2. The Ninth Circuit also reads too much into the testimony at the 1923 Senate hearing in which the contract-of-employment exclusion was suggested. At that hearing, Senator Sterling, the sponsor of the FAA in the Senate, asked W.H. Piatt, the chairman of the ABA committee that proposed the FAA, whether he was aware of a letter the Senator had received from a constituent. The following colloquy ensued:

> Mr. PIATT. No, sir; but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen —
>
> Senator STERLING. Mr. Furuseth?
>
> Mr. PIATT. Yes; some such name as that. He has objected to it, and criticised it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of the bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing

> with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

1923 Joint Hearing at 9.

Quoting the last few sentences of this testimony, the Ninth Circuit concluded that the bill was not intended to apply to employment contracts of any sort. *See Campbell Soup*, 177 F.3d at 1089-90. It is not, however, clear that Mr. Piatt's testimony was so broad. Earlier, Piatt had stated that the bill was not intended to require an "industrial arbitration," which could be understood to be a reference to arbitration under collective bargaining agreements. Indeed, Senator Sterling appeared to understand the proposal in this way: later in the hearing, he referred to the witness's "suggested amendment in regard to the *labor associations*." 1923 Joint Hearing at 10 (emphasis added).

This conclusion is reinforced by a 1928 ABA proposal for a "United States Industrial Arbitration Act." 53 ABA Reports at 381. That proposal would have extended the FAA to cover arbitration provisions in written agreements "made by an employer or organization of employers *with an organization of employees*." *Id.* at 376 (emphasis added). As collective bargaining agreements are agreements between employers and organizations of employees, the ABA's committee on commerce—which in 1928 still included Julius Henry Cohen, the primary draftsman of the FAA *(see id.*; 1924 Joint Hearing at 15)—plainly understood the term "industrial arbitration" to refer to arbitration under collective bargaining agreements, not individual contracts of employment. Accordingly, there is some basis in the historical materials for the position that the contract-of-employment exclusion covers only collective bargaining agreements. *See, e.g., United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954);1 Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 11.22, at 11:6 (1999).

Furthermore, even if Mr. Piatt's testimony had clearly indicated *his* understanding that the ABA's proposal would not cover any individual employment contracts, it is by no means clear that his view was shared by the ABA as a whole. Certainly, the ABA's standing committee on commerce, which proposed the FAA, took a different view on whether the bill was intended to cover employment contracts. As indicated above, *see supra* pp. 19-20, the committee later said its original proposal was supposed to cover such contracts:

> From the foregoing it will appear that the Association originally favored the application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy . . . .

53 ABA Reports at 351.

The committee also noted that New York's arbitration statute "appl[ies] to *all* agreements to arbitrate, whether in the commercial or industrial field." 53 ABA Reports at 351 (emphasis added); *see also* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* § 32, at 108 n.24 (1930) ("It is clear that a future disputes agreement is not taken out of the application of the New York statute because it is in an employment contract.") (citations omitted). As the New York statute formed the model for the FAA, *see* S. Rep. No. 68-536, at 3, it follows that the ABA's original bill was also intended to cover arbitration provisions in employment agreements and that Mr. Piatt's suggestions to the contrary in the 1923 Senate hearing were either an idiosyncratic personal view or a disingenuous evasion. In either event, his testimony does not provide a basis for concluding that Congress or even the ABA intended the exclusion in Section 1 to cover all employment contracts.

3. In *Campbell Soup*, the Ninth Circuit also relied on a letter that Herbert Hoover sent to the Senate Committee on the Judiciary in 1923, which was reprinted in the 1924 joint

hearings. *See* 177 F.3d at 1090; *see also* 1923 Senate Hearing at 14. As noted above, *see supra* p. 18, this letter contains a sentence referring to the contract-of-employment exclusion: "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating, 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" Letter from Herbert Hoover to Hon. Thomas Sterling, Jan. 31, 1923, *reprinted in* 1923 Senate Hearing at 21. Focusing on the phrase "workers' contracts," the Ninth Circuit concluded that the exclusion was intended to cover all employment contracts. *See Campbell Soup*, 177 F.3d at 1090. This awkward phrase, which was written on the day of the Senate hearing in 1923, will not support the weight that the Ninth Circuit places upon it. As this Court has noted in an analogous context, the language of such an informal communication should not be dissected as if it were in the United States Code. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993).

4. In its *amicus* brief in the *Gilmer* case, the AFL-CIO cited some historical materials not relied upon by the Ninth Circuit. *See* AFL-CIO Br. at 16-24. None of the arguments drawn from those materials has merit.

a. The AFL-CIO noted that there was "nothing to indicate that labor's opposition was limited to the narrow range of labor contracts that would be excluded" under a narrow interpretation of the contract-of-employment exclusion. AFL-CIO Br. at 17-18. The basis for labor's objection to the FAA, the AFL-CIO asserted, was "the fear that weak unions, or individuals, would be compelled to submit to arbitration clauses, and that arbitral decision-makers would as a practical matter be under the control of the employers." *Id.* at 18 (citing 53 ABA Reports at 351-52). The AFL-CIO's brief cites, however, to views expressed in 1928 in support of this assertion. *See* 53 ABA Reports at 352 & n.*. Moreover, the

contemporaneous historical materials cited by the AFL-CIO do not speak at all about weak unions; they talk about the unequal bargaining power between workers and their employers. *See* Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203-04 (1923); Proceedings of the 45th Annual Convention of American Federation of Labor 52 (1925). This Court has, however, already rejected the suggestion that Congress did not intend to apply the FAA simply because of a disparity in bargaining power. *See Gilmer*, 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *see also* MacNeil, *American Arbitration Law* 90 & nn.47-48 (noting that Congress did not respond to concerns about unequal bargaining power in construction, freight, and insurance contracts). Thus, the AFL-CIO's suggestion that Congress included the contract-of-employment exclusion out of concern for unequal bargaining power is simply incorrect.

b. The AFL-CIO also observed that the subject matter of the 1924 joint hearing was "described as 'Arbitration of Interstate *Commercial* Disputes'" and that the testimony at the hearing "reflects the commercial nature of the bill." AFL-CIO Br. at 20 (quoting and emphasizing 1924 Joint Hearing at 1). The title of the 1924 hearing was, however, virtually the same as the title of the Senate hearing the year before even though the latter hearing was prior to the addition of the contract-of-employment exclusion. *See* 1923 Senate Hearing at 1 (hearing entitled "Federal Commercial Arbitration"). More fundamentally, as this Court has repeatedly recognized, the fact that the legislative history of a statute focuses upon one subject (here, commercial arbitration) does not mean that the statute is necessarily limited to that subject. *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 105, 115-16 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history . . . ."); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679

(1983) (noting that Congress' focus on one problem "does not create a 'negative inference' limiting the scope of the Act to the specific problems that motivated its enactment").

c. Finally, the AFL-CIO relied on the ABA's 1928 proposal for an industrial arbitration act and a 1942 proposal to amend the FAA to extend to "'labor controversies.'" AFL-CIO Br. at 23-24 (quoting 88 Cong. Rec. 2072). As this Court has repeatedly stressed, however, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Jones v. United States*, 526 U.S. 227, 236 (1999) (quotations omitted); *accord Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *United States v. Price*, 361 U.S. 304, 313 (1960). Moreover, such post-enactment history is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp.*, 496 U.S. at 650.

In any event, neither the ABA proposal nor the 1942 proposed amendments offers the AFL-CIO's expansive interpretation of the contract-of-employment exclusion any support. As noted above, the ABA proposal for an industrial arbitration act dealt with collective bargaining agreements, not individual employment contracts. *See supra* pp. 24-25. Similarly, the 1942 proposed amendments would have extended the FAA to cover written arbitration agreements "entered into by *a labor organization* with an employer or group of employers engaged in commerce *or by one labor union with another labor union*." 88 Cong. Rec. 2072 (emphasis added).[6] Thus, the post-enactment history cited by

[6] Indeed, this proposal appears to have been motivated by concerns over the enforcement of agreements to engage in interest arbitration—that is, arbitration of the terms of a new agreement rather than arbitration of the meaning of the terms of an existing agreement—not conventional (continued...)

the AFL-CIO provides more support for the position that the contract-of-employment exclusion was limited to collective bargaining agreements than it does for the Ninth Circuit's expansive interpretation—thereby demonstrating why the legislative history of the contract-of-employment exclusion is too confusing and ambiguous to provide any useful guidance. The exclusion should instead be interpreted in light of its plain language, the structure of the FAA, and the applicable rules of construction, all of which preclude the anomalous interpretation adopted below.

[6] (...continued)
arbitration of disputes arising under individual employment contracts. *See* 88 Cong. Rec. at 2072 (citing a 1940 report of the New York State Legislative Committee on Industrial and Labor Relations); *see also Report of the New York State Legislative Comm. on Industrial and Labor Relations* 38-41 (1940) (noting that New York's arbitration law did not cover interest arbitration at that time). Accordingly, the 1942 proposed amendments would have extended the FAA to cover agreements to arbitrate "controversies concerning past, present, *or future* rates of pay, wages, hours of employment." 88 Cong. Rec. 2073 (emphasis added).

CONCLUSION

For the reasons stated above, this Court should interpret the exclusion in Section 1 of the Federal Arbitration Act to be limited to contracts of employment for individuals engaged in interstate or international transportation and reverse the decision of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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I. PERMISSION TO FILE *AMICUS CURIAE* BRIEF

The Securities Industry Association ("SIA") files this *amicus curiae* brief with the automatic consent of all parties, a copy of which has been lodged herein.

II. STATEMENT OF INTEREST[1]

The SIA brings together the shared interests of more than 740 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all United States and foreign markets and in all phases of corporate and public finance. The United States securities industry manages the accounts of approximately 50 million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The industry generates in excess of $300 billion of revenues yearly in the United States.

This decision below precludes employers operating within the geographic area encompassed by the Ninth Circuit Court of Appeals — the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands — from relying on the Federal Arbitration Act ("FAA" or the "Act") in federal court to enforce arbitration agreements with employees who are not directly engaged in the channels of interstate commerce. Currently, employers and employees in all jurisdictions outside the Ninth Circuit — forty-one states and Puerto Rico — may utilize the FAA to enforce arbitration agreements in federal court.

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1. This *amicus curiae* brief filed in support of the Petitioner Circuit City Stores, Inc. was funded solely by the SIA and authored entirely by counsel for the SIA.

Perhaps more so than any other industry in the United States, employers and employees in the financial services industry have relied on arbitration as the process for resolving workplace and customer disputes. Significantly, the vast majority of SIA members have nationwide operations and have implemented or are considering the implementation of bilateral arbitration agreements entered into as a condition of employment. The decision in *Circuit City Stores, Inc. v. Saint Clair Adams*, if affirmed by this Court, would effectively eliminate arbitration as a viable method of employment dispute resolution in the financial services industry because SIA members and their employees would be unable to enforce arbitration agreements pursuant to the FAA, a right which they are currently free to exercise in all courts outside the Ninth Circuit.

In the securities industry, employment claims are almost always intertwined with performance issues that may have regulatory significance. For these reasons, arbitration of employment claims is an important part of how SIA's members conduct business.

The SIA is familiar with the issue presented by this case and believes that it would be helpful to the Court to file this *amicus curiae* brief in order to assist the Court in the resolution of this case. The SIA, therefore, submits this memorandum to demonstrate to the Court why the Ninth Circuit's decision in *Circuit City Stores, Inc.* should be reversed.

III. SUMMARY OF ARGUMENT

In its 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision, this Court clearly held that the FAA could be used

to compel employees to arbitrate their Age Discrimination in Employment Act claims. Subsequently, lower courts, including those in all Circuit Courts of Appeals — with the exception of the Ninth Circuit — have made it clear that other statutory discrimination claims, including those arising under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, may be the subject of an arbitration agreement enforceable pursuant to the FAA. Moreover, since *Gilmer*, all Circuit Courts of Appeals — with the exception of the Ninth Circuit — have expressly ruled, or affirmed previous decisions pre-dating *Gilmer*, that the FAA applies to employment contracts, except those covering employees directly engaged in the movement of goods in interstate commerce.

The Ninth Circuit in its decision below in *Circuit City Stores, Inc.* and its previous decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982, 119 S. Ct. 445 (1998), where it ruled that discrimination claims brought under Title VII would not be compelled to arbitration, has effectively nullified this Court's unqualified endorsement of arbitration as a means of resolving employment disputes expressed in *Gilmer* and destroyed the right of employers and employees to agree, and then enforce their agreement, to resolve employment related disputes in arbitration. As this Court noted in *Gilmer*, "[i]t is by now clear that statutory claims may be subject of an arbitration agreement, enforceable pursuant to the FAA." 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). To allow the Ninth Circuit's implicit judicial hostility to arbitration of employment disputes to stand is not only contrary to *Gilmer* and the holdings of every other judicial circuit, but directly contradicts the liberal federal policy favoring arbitration agreements expressed by the FAA.

As set forth more fully in the brief of Petitioner, the Ninth Circuit in *Circuit City Stores, Inc.* erroneously interpreted the exclusion contained in section 1 of the FAA.

Moreover, if this Court adopts the Ninth Circuit's position that the FAA does not apply to arbitration agreements contained in employment contracts,[2] *Gilmer's* unequivocal support of arbitration as a dispute resolution mechanism for controversies arising between employer and employee would effectively be rendered dead-letter law and the ability of parties to enforce arbitration agreements under the FAA would be destroyed. The policy implications of such a ruling would be devastating.

First, the court dockets would be further overburdened with employment claims due to the addition of the many employment claims which otherwise would have been resolved in arbitration. Moreover, in one fell swoop, the principal advantages of arbitration, supported by empirical evidence — shorter time to final resolution of disputes and the ability to resolve disputes while repairing or maintaining employment relationships, with some degree of confidentiality and enormous cost savings to both sides — would be vitiated.

Further, the Court's ruling below creates intractable problems unique to the securities industry. Effective January

2. Like the arbitration agreement at issue in *Gilmer*, which was contained in a securities registration application, the arbitration agreement here was not contained in a "contract of employment" as that term is commonly understood. The arbitration agreement which Circuit City Stores, Inc. asked its employees to sign simply established the obligation to arbitrate, but had no further impact on setting terms and conditions of employment.

1, 1999, the Securities and Exchange Commission ("SEC") approved a change to the Form U-4[3] registration agreement whereby registered representatives were no longer required to arbitrate statutory discrimination claims as a condition of working in the securities industry, while at the same time, requiring that non-discrimination employment claims between employees and employees still be arbitrated. However, the change in this rule permitted continued arbitration of both statutory discrimination and other non-discrimination claims via bilateral agreements between employers and their employees. This Court's decision to affirm the Ninth Circuit's ruling in *Circuit City Stores, Inc.* would therefore prevent employers and employees in the financial services and other industries from enforcing their agreements to arbitrate disputes involving statutory employment discrimination claims under the FAA, but still require that non-statutory discrimination claims be arbitrated pursuant to the Form U-4 between the exchange and the employee. This bifurcation caused by *Circuit City Stores, Inc.* nullifies the ability of employers and employees to decide that all employment related claims should be resolved in a single forum, with all of the attendant problems associated with bifurcation of claims.

3. The Form U-4, Uniform Application for Securities Industry Registration, is a uniform standardized form which must be completed by anyone seeking to work as a broker in the securities industry, regardless of the jurisdiction in which they work.

IV. ARGUMENT

A. The *Circuit City Stores, Inc.* Decision Was Wrongly Decided and Conflicts With Supreme Court Precedent And All The Other Circuit Courts

Every other circuit court that has addressed the issue presented in this case has disagreed with the Ninth Circuit's holding that the FAA precludes the enforcement of arbitration agreements contained in employment contracts.

Section 2 of the FAA, 9 U.S.C. § 2 (1994 & 2000 Supp.), states that the FAA applies to all "written provision[s] in any maritime transaction or a contract evidencing a transaction involving commerce." Section 1 of the FAA, however, excludes from coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994 & 2000 Supp.). Accordingly, the question which the Court has agreed to review hinges on the interpretation of the clause "any other class of workers engaged in foreign or interstate commerce" that is contained in section 1 of the FAA. All of the circuit courts with the exception of the Ninth Circuit have determined that the exclusionary langua[illegible] present in section 1 of the FAA is to be narrowly construed to workers literally involved in interstate commerce. *See, e.g.*, *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.), *cert. denied*, 522 U.S. 915, 118 S. Ct. 299 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 363-64 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997).

A leading case supporting the position which all of the Circuit Courts of Appeals have adopted, with the exception of the Ninth Circuit, is *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972). In 1971, Erving left the University of Massachusetts and signed a contract to play basketball for the Virginia Squires of the American Basketball Association. *See id.* at 1066. Erving's contract provided that any dispute would be settled by arbitration. *Id.* at 1066 n.1. In April of 1972, Erving signed a contract to play with the National Basketball Association's Atlanta Hawks. *Id.* at 1066. The Squires sought to enforce Erving's contract through arbitration. Erving sought to avoid arbitration and have the court set aside his original contract. In his attempt to avoid arbitration, Erving argued that his contract fell under the FAA's section 1 exclusion.

In rejecting this argument, the court set forth in definitive terms the limits of the exclusion: "the exclusionary clause in Section 1 applied only to those actually in the transportation industry. Erving clearly is not involved in the transportation industry." The court therefore affirmed an order staying the player's action to rescind his contract pending arbitration. *Id.* at 1069. In reaching its decision, the court said the following which should bear directly on this Court's consideration of the issue presented here: "[i]n light

of the strong national policy in favor of arbitration as a means of settling private disputes, we see no reason to give an expansive interpretation to the exclusionary language of Section 1." *Id.*

Indeed, if this Court were to affirm the Ninth Circuit's ruling, and effectively eviscerate the right of parties to contract freely to arbitrate employment disputes, the decision would undermine the purposes of the FAA, which expresses a strong federal policy favoring arbitration. That policy has been articulated at all levels of the federal judicial system, including repeated pronouncements which this Court has issued. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29, 111 S. Ct. 1647, 1653 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 3358 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S. Ct. 852, 861 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401-02, 87 S. Ct. 1801, 1805 (1967). In fact, the stated purpose of the FAA — originally titled the United States Arbitration Act — is "[t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts." United States Arbitration Act, ch. 213, 43 Stat. 883 (1925). Accordingly, an agreement between an employer and employee to arbitrate all employment claims not only impacts the individual contractual interests of the parties, but also implicates the federal policy favoring arbitration. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983) ("the Courts of Appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy of arbitration").

Therefore, contrary to the Ninth Circuit's holding, the language of section 1 of the FAA and the reference to "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" suggests that Congress intended to refer to workers engaged in commerce in the same way that seamen and railroad workers are. Indeed, in *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995), the court, after a thorough analysis of the treatment of this issue by the other circuit courts of appeals, came to this very conclusion which should be adopted by this Court:

> [T]he exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress which enacted it. The meaning of the phrase 'workers engaged in foreign or interstate commerce' is illustrated by the context in which it is used, particularly the two specific examples given, seamen and railroad employees, those being two classes of employees engaged in the movement of goods in commerce.

B. The Ninth Circuit's Decisions in *Circuit City Stores, Inc.* and Previously in *Duffield v. Robertson Stephens & Co.* Nullify This Court's *Gilmer* Decision And Are Calculated To Eliminate Arbitration As A Resolution Mechanism For Employment Disputes

In two decisions handed down within one year of each other, the Ninth Circuit has effectively nullified this Court's *Gilmer* decision and unjustifiably destroyed the right of employers and employees to agree to resolve all of their disputes in arbitration. First, in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982, 119 S. Ct. 445 (1998), the Ninth Circuit, again contrary to every other circuit court to have addressed the issue, held that the Civil Rights Act of 1991 (the "1991 Act") prohibits the enforcement of pre-dispute arbitration agreements governing statutory claims of employment discrimination. To compound the Ninth Circuit's isolation on this issue, the decision in *Circuit City Stores, Inc.* now removes other non-discrimination claims from arbitration that survived *Duffield's* prohibitions, namely common-law and non-statutory employment claims. The result is the evisceration of this Court's long-standing commitment to the federal policy favoring arbitration and an unprecedented assault on the long-standing method of dispute resolutions for claims arising between financial services industry employees and their employers, as well as other industries that have embraced arbitration to resolve their employment disputes. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337 (1985).

In *Duffield*, the Ninth Circuit largely ignored this Court's endorsement of arbitration as a method of resolving statutory discrimination claims in *Gilmer* and found that the legislative

history to the 1991 Civil Rights Act established that Title VII discrimination claims could not be compelled to arbitration by a federal court. Similarly, in *Circuit City Stores, Inc.* and its predecessor, *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), the Ninth Circuit again contorts the plain meaning of statutory language to hold that the FAA excludes all employment contracts from its jurisdiction.

As is shown below, if employers and employees were unable to enforce arbitration agreements under the FAA, overburdened courts would be deluged with additional employment lawsuits. Moreover, the empirical evidence demonstrates, contrary to the Ninth Circuit's implicit hostility towards the process, that arbitration offers many advantages to both employers and employees.

1. *The Effects of this Court's Decision to Affirm the Ninth Circuit Would be Overwhelming*

This Court's decision to affirm the Ninth Circuit's latest assault on arbitration of employment disputes would further overburden the courts with thousands of employment disputes. This Court in *Gilmer* recognized that arbitration "can further broader social purposes." 500 U.S. at 28, 111 S. Ct. at 1653. Indeed, this Court's long-standing support of arbitration as a matter of federal policy has as one of its bases the desire have alternative dispute resolution mechanisms ease the burden on an overcrowded court system. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

In fact, since this Court's 1991 *Gilmer* decision, more and more employers have implemented arbitration programs.

A 1994 General Accounting Office ("GAO") survey of private employers found that approximately 10% of employers utilize arbitration to resolve employment disputes. U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 at 7 (1995). By 1997, the GAO estimated that the figure had almost doubled to 19%. U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, GAO/GGD-97-157 at 2 (1997) ("*ADR in the Workplace*"). In the securities industry alone, some 32% of the employees of the largest 50 securities firms in the United States had agreed to arbitrate all claims arising out of their employment by virtue of signing a Form U-4. U.S. General Accounting Office, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-17 at 3 (1994). Some of those firms also require non-registered employees to sign individual arbitration agreements as a condition of employment.

Accordingly, if this Court were to accept the Ninth Circuit's latest blow against the arbitration of employment disputes in *Circuit City Stores, Inc.*, the result would be a dramatic increase in the number of employment claims that are brought in court. For example, the Administrative Office of the United States Courts estimates that the number of employment cases filed annually in the federal courts increased approximately 55% from 1992 to 1997. Administrative Office of the United States, *Judicial Business of the United States Courts 1997* at Table C-2. Moreover, approximately 10% of the docket of the federal courts today already involves employment issues. Leonidas Ralph Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *Report of the Director* (Administrative Office of the United

States Courts, Sept. 30, 1999) (statistic compiled from Table C-2, reporting total employment civil rights actions and total cases filed in the United States District Courts during the twelve month period ending September 30, 1999).

2. *Empirical Evidence Establishes That Arbitration Provides A Fair and Impartial Dispute Resolution Forum*

Contrary to the Ninth Circuit's decided aversion to arbitration of employment disputes, the empirical evidence reveals that arbitration provides employees and employers many benefits. As one observer has noted:

> [A]lternative employment dispute resolution has the potential to be more cooperative or less adversarial than litigating employment disputes and, still further, employment relationships between companies and aggrieved employees are potentially more likely to continue or be re-established under alternative dispute resolution systems than under litigation.

See David Lewin, *Dispute Resolution in Non Union Organizations: Key Empirical Findings*, Alternative Dispute Resolution in the Employment Arena, Proceedings, 53rd Annual NYU Conference on Labor (S. Estreicher, Editor, forthcoming 2000).

Other empirical evidence of the advantages of arbitration of employment disputes compared to litigation of such disputes are revealed in another recent study prepared by SIA's counsel prior to his retention on this matter. This study included: (i) a review of outcomes for all employment

discrimination cases filed and resolved in the United States District Court for the Southern District of New York for the period April 1, 1997 to November 30, 1999, and (ii) a survey of securities industry arbitration awards based on available National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE") arbitration awards involving discrimination claims during the same time period. *See* Michael Delikat, *An Empirical Study of Dispute Resolution Mechanisms For Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, Alternative Dispute Resolution in the Employment Arena, Proceedings, 53rd Annual NYU Conference on Labor (S. Estreicher, Editor, forthcoming 2000). This study found that employee-claimants in arbitration before the NASD and NYSE prevailed in 48% of the cases filed, yet only 30% of all employees filing discrimination cases in the United States District Court for the Southern District of New York prevailed in litigation. Additionally, this study found that it took approximately 50% longer to resolve employment disputes in court compared to arbitration (even though the study only tracked outcomes through verdict, not post-verdict modifications or appeals which would further lengthen the time for complete judicial resolution) and that claimants incurred almost 50% more attorneys' fees in pursuing all claims in court compared to arbitration. *See id.*

Further, a recently issued study which compared the advantages of arbitration compared to litigation, conducted by Lewis Maltby, the Director of the American Civil Liberties Union's National Task force on Civil Liberties in the Workplace, confirmed the results of the study performed by SIA's counsel. Mr. Maltby's study revealed that

> [t]he entire class of employees who take their disputes to court collectively receive 10.4 percent of their total demand. Employees who take their disputes to arbitration receive 18 percent of their total demand. Employees who take their dispute to arbitration receive almost twice as much of their demands as the employees who take their dispute to court . . . [F]ar more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court.

See Lewis Maltby, Employment Arbitration: Is it Really Second Class Justice?, 6 No. 1 DISP. RESOL. MAG. 23, 23-24 (1999).

Accordingly, the studies — conducted by individuals representing the interests of both employees and employers — reveal the following about arbitration: (1) employees prevail more frequently in arbitration than in federal court and receive a higher percentage of their original demand in arbitration than they do in federal court; (2) employees alleging discrimination claims see their claims resolved substantially faster in arbitration than in federal court; (3) transactional costs in the form of attorneys' fees are substantially lower in arbitration; and (4) victims of discrimination are more likely to have the opportunity to present their claim to the factfinder in arbitration than in litigation.[4] In short, despite the Ninth Circuit's implicit

4. By contrast to litigation, the rules of the various institutions which hear arbitration claims, *e.g.*, the NYSE, the NASD, the AAA, do not explicitly provide for motions for summary judgment or (Cont'd)

blacklisting of arbitration as being unfair to employees, arbitration resolves disputes fairly, quickly and efficiently.

In sum, affirming the Ninth Circuit's decision in *Circuit City Stores, Inc.* would ignore the many benefits of arbitration established by empirical studies and the many years of fair dispute resolution that financial service industry employers and employees have enjoyed. In the absence of any statutory support or policy reason to eviscerate this system, this Court should not sanction this obvious effort by the Ninth Circuit to destroy arbitration of employment disputes.

C. The Ninth Circuit's Decision in *Circuit City Stores, Inc.* Creates Troubling Issues Peculiar to SIA Members

The Ninth Circuit's decision in *Circuit City Stores, Inc.* has profound consequences for SIA members for another reason. Effective January 1, 1999, the NASD and NYSE ended the long-standing requirement in the securities industry, contained in the Form U-4, that broker-dealer employees arbitrate statutory claims of employment discrimination against their member firms. In announcing the adoption of the new rule, SEC Commissioner Isaac C. Hunt, Jr. stated that the rule change "will not address all the

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(Cont'd)
dismissal and, in actual practice, pre-hearing dismissals on substantive motions are extremely rare. This means that some claims which otherwise would have been dismissed in court on legal grounds are presented to arbitrators, allowing the claimant an opportunity which he or she otherwise may not have — the opportunity to attempt to persuade the arbitrators that "fairness" dictates that the claimant be granted relief, even where strict legal elements may be lacking.

issues," because although the NASD (and NYSE) are now taken out of the business of enforcing industry-wide pre-dispute arbitration agreements relating to statutory employment claims, the rule change does not prevent any brokerage firm from including pre-dispute arbitration agreements in individual contracts. *See, e.g., Arbitration: SEC approves NASD Proposal To Find Mandatory Arbitration of Bias Claims*, Daily Lab. Rep. (BNA) No. 121, at A-10 (June 24, 1998). The consequence of this rule change — that SIA member firms, all of whom belong to at least one of the self-regulatory organizations, would still be able to continue existing or enter into "private" pre-dispute arbitration agreements with their employees — moderated opposition from securities industry employers to the adoption of the rule. Indeed, in providing its support to the rule change, and a one year phase-in period from the time the SEC approved the rule until its effective date, the SIA expressly noted that "employers and firms need this time to consider what agreements they may wish to enter into directly with each other with regard to dispute resolution."

Accordingly, in assenting to the SEC's decision to revise radically the securities industry practice with respect to arbitration of statutory discrimination claims, SIA members concluded that they would have the option of continuing arbitration, but would be required to do so through private, bilateral agreements they reach with their employees. This shift — away from the certainty that *Gilmer* had provided in its holding that arbitration agreements between employers and regulatory or licensing bodies are enforceable to compel arbitration of statutory employment discrimination claims through use of the FAA — was only palatable to securities

industry employers if the courts had the power under the FAA to enforce the private, bilateral arbitration agreements that could, and for many SIA members, have replaced the arbitration clause contained in the Form U-4.

However, the decision in *Circuit City Stores, Inc.* now nullifies the option of allowing employers and employees to enter into bilateral agreements to resolve all of their employment disputes in a single arbitral forum — an option specifically sanctioned by the SEC. If *Circuit City Stores, Inc.* is affirmed, the ability to enforce these private arbitration agreements in the securities industry under the FAA would be largely a dead letter — as would this Court's decision in *Gilmer*. Moreover, because the Form U-4 still mandates that non-discrimination claims between registered representatives and their employers be arbitrated before the NASD or NYSE, those cases where both discrimination and non-discrimination claims are asserted will be bifurcated, even where the parties have entered into private bilateral agreements to resolve all claims in a single forum. As such, *Circuit City Stores, Inc.* poses unique and intractable problems for alternative dispute resolution of employment claims for security industry members.

V. CONCLUSION

For the foregoing reasons, the SIA respectfully asks this Court to reverse the Ninth Circuit's decision in *Circuit City Stores, Inc. v. Saint Clair Adams*.

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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM") submits this brief in support of Petitioner Circuit City.[1] SHRM is the largest human resource association in the world with over 140,000 professional members from all 50 states and 80 other countries; SHRM is the leading voice of the human resource profession. SHRM's mission is to lead, represent, guide, and inform human resource practitioners and others interested in human resource issues regarding matters of critical and strategic importance to the workplace.

SHRM members, probably more than any other association of professionals, will be responsible for designing and implementing arbitration programs, policies, and procedures that comport with the Court's decision.

SHRM welcomes the opportunity to file this brief to assist the Court's understanding of the enormous practical effect its decision will have in the workplace.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed. The Federal Arbitration Act, 9 U.S.C.A. §§ 1-14 (West 1999) ("FAA"), proclaims a liberal federal policy favoring arbitration of disputes. Section 1 of the FAA, however, excludes from its purview "contracts of employment of seamen, railroad employees, or any other class

1. Pursuant to Supreme Court Rule 37.3(a), *amicus* files this brief with the consent of the parties. Evidence of consent is filed concurrently with this brief. *Amicus* discloses pursuant to Supreme Court Rule 37.6 that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

of worker engaged in foreign or interstate commerce." Every circuit court, other than the Ninth Circuit, has come to the conclusion that Section 1's exclusions were intended to apply only to a limited class of contracts: *i.e.*, contracts of those employees actually engaged in the movement of goods across state lines. SHRM urges this Court to follow the decisions of the majority of circuit courts.

Consistent with the intent and purpose of the FAA and subsequent legislation by Congress, agreements to arbitrate in the employment context are enforceable under the FAA. Further, empowering employees and employers to work together to prevent and resolve workplace disputes without judicial intervention has been the policy of Congress and this Court for the last seventy-five years. The Ninth Circuit's decision deviates from this long line of precedent and, therefore, should be overturned.

SHRM urges this Court to follow the recent, practical decisions endorsing and encouraging arbitration that it has developed over the past two decades. As set forth below, to affirm the Ninth Circuit would call into question the validity of the employment practices and policies developed and relied upon for decades.

Finally, the agreement to arbitrate at issue is set forth in a job application which the Ninth Circuit concluded, a fortiori, was a contract of employment. SHRM and its members are concerned that if a job application is considered an employment contract then other documents and agreements ancillary to the employment relationship also will be considered contracts of employment. If so, under the Ninth Circuit's reasoning, arbitration of these ancillary issues (which are longstanding practices in some instances) are unenforceable under the FAA. From a human resources perspective, sustaining the Ninth

Circuit's decision will change the landscape of how SHRM and its members apply these policies. SHRM believes this was neither the intent of Congress nor is it consistent with this Court's decisions encouraging arbitration.

ARGUMENT

I.

THE COURT OF APPEALS' RULING IS INCONSISTENT WITH CONGRESSIONAL INTENT AND THIS COURT'S ADVOCATION OF A "FEDERAL POLICY FAVORING ARBITRATION."

The Ninth Circuit's refusal to compel arbitration under the FAA contravenes Congressional intent favoring arbitration of employment disputes. It also is at odds with every other circuit court to consider this issue.[2]

---

2. SHRM anticipates that the central issue as to the meaning, intent, and purpose of Section 1 of the FAA and, in particular, its exclusion of certain types of contracts will be briefed and argued by the parties. Accordingly, SHRM does not address this issue, but urges the Court follow the circuit court decisions holding that Section 1's exclusions were intended to apply only to a limited class of contracts: *i.e.*, contracts of those employees actually engaged in the movement of goods across state lines. *See, e.g., Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 363-64 (7th Cir. 1999); *Seus v. Nuveen & Co.*, 146 F.3d 175, 178-79 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998); *Patterson v. Tenent Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997); *Miller v. Public Storage Mgt.*, 121 F.3d 215, 217-18 (5th Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Dickstein v. DuPont & Co.*, 443 F.2d 783, 785 (1st Cir. 1971).

The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). The FAA's legislative history demonstrates that the drafters intended to broaden the use of arbitration and protect agreements to arbitrate from the courts' "jealousy" for their own jurisdiction. *See* H.R. REP. No. 68-96, at 1-2 (1924) (the courts "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction"); S. REP. No. 68-536, at 2-3 (1924) ("the jealously of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction").

In the seventy-five years since the FAA's enactment, its goal of eliminating judicial hostility towards arbitration has been achieved.[3] This Court, moreover, has encouraged "a federal policy favoring arbitration," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and has held that courts must "rigorously enforce agreements to arbitrate" under the FAA. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

3. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987) (the "mistrust of the arbitral process" has been undermined by recent arbitration decisions); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-627 (1985) ("[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution").

A. Subsequent Legislation by Congress Presumes That Employment Disputes Are Arbitrable Under the FAA.

The Ninth Circuit's decision holds that even voluntary agreements to arbitrate between an employer and employee (presumably including agreements to arbitrate after a dispute arises) are unenforceable under the FAA. This holding patently is at odds with congressional intent permitting voluntary arbitration of civil rights claims.

Congress, in enacting legislation, is presumed to be aware of existing legislation. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 26 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). The enactment of employment discrimination statutes after passing the FAA indicates congressional intent to permit arbitration under these laws to be enforced pursuant to the FAA.

The amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1994) ("Title VII"), by the Civil Rights Act of 1991 ("CRA 1991"), demonstrates the acceptance and encouragement of extra-judicial resolution, and, specifically, arbitration.[4] Section 118 of the CRA 1991 states, "[w]here appropriate and to the extent

4. A number of lower courts have compelled arbitration, in part, on this basis. *See, e.g., Seus v. John Nuveen,* 146 F.3d at 182 (affirming decision compelling arbitration stating "the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration"); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996) (the 1991 CRA and ADA "encourage[] arbitration"); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.4 (7th Cir. 1995) (the CRA of 1991 "encouraged the use of arbitration to resolve ADEA claims"); *EEOC v. Frank's Nursery & Crafts*, 966 F. Supp. 500, 503 (E.D. Mich. 1997) (Congress has "evinced a specific intent to encourage arbitration of Title VII claims").

authorized by law, the use of alternative means of dispute resolution including, . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, § 118, 105 Stat. 1071 (set forth in the notes following 42 U.S.C.A. § 1981 (West 1994)). Further, the legislative history states that:

> This section "encourages" the voluntary use of conciliation, mediation, arbitration and other methods for resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims.
>
> . . .
>
> We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.

H.R. REP. NO. 102-40(II), at 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Similarly, it was stated at the Senate hearings that "where the parties knowingly and voluntarily elect to use these methods," arbitration would be encouraged. 137 CONG. REC. S15472, S15478 (statement of Sen. Dole) (1991).

Title VII's legislative history, moreover, indicates that the Equal Employment Opportunity Commission ("EEOC") was created to mediate claims and, thus, forego the need to resort to the courts. *See* 110 CONG. REC. S11848 (1964) (statement of Sen. Humphrey) (the EEOC would be created "to investigate complaints and to bring about voluntary settlement"); 110 CONG. REC. S7242 (1964) (statement of Sen. Case) ("much may be

accomplished in achieving fair employment opportunities through the wise and imaginative exercise of persuasion, mediation, and conciliation"). A ruling that does not uphold arbitration may dampen the trend by the EEOC, employers, and lower courts for finding alternative dispute resolution, such as mediation, conciliation, and arbitration as alternatives to court.

The regulations governing Title VII further demonstrate the reliance on settling cases through extra-judicial methods. *See* 29 C.F.R. § 1601.20 (1999) (encouraging settlement prior to issuing a determination). Even when the EEOC finds reasonable cause to believe a violation of the anti-discrimination laws has occurred, Title VII expressly requires it to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C.A. § 2000e-5(b) (West 1994).

The Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West 1994) ("ADA"), also specifically encourages parties to use extra-judicial methods of resolving disputes: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." *Id.* § 12212.

It is clear that under Title VII and the ADA parties may voluntarily agree to arbitrate.[5] Assume an employer and employee agree, after a dispute arises, to resolve the matter through arbitration. After three days of arbitration can one party "pull out," believing the arbitration is going poorly, to try anew

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5. In *Gilmer*, this Court found that claims under the Age Discrimination in Employment Act also were arbitrable. *See* 500 U.S. 20.

before a judge or jury? If not, under what law will arbitration be compelled? Title VII and the ADA do not confer specific jurisdiction on the federal courts to enforce agreements to arbitrate.[6] Thus, Congress understood and presumed that another vehicle existed to compel arbitration: *i.e.*, the FAA.

II.

THIS COURT'S DECISIONS WITH RESPECT TO WORKPLACE DISPUTES FAVOR INTERNAL EMPLOYMENT POLICIES DESIGNED TO PREVENT AND REDRESS PROBLEMS WITHOUT RESORTING TO JUDICIAL INTERVENTION.

A. The Explosion of Workplace Litigation Has Placed an Overwhelming Burden on the Courts.

In the past decade, the number of employment discrimination cases filed in federal court has nearly tripled. *See Employment Bias Cases in Federal Court Almost Tripled in Previous Decade*, Daily Labor Rep. (BNA) A-1 (Jan. 20, 2000) (the number of employment cases filed in federal courts between 1990 and 1998 jumped from 8,413 to 23,735); *see also* U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1992 through FY 1999* (visited July 18, 2000) <http://www.eeoc.gov/stats/> (77,444 discrimination charges were filed with the EEOC in 1999).

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6. In contrast, Congress conferred specific jurisdiction for the federal courts to enforce contracts between an employer and a labor organization representing employees, including jurisdiction to enforce arbitration provisions contained in collective bargaining agreements. *See* Labor Relations Management Act § 301, 29 U.S.C.A. § 185(a) (West 1998); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that Section 301(a) of the LMRA authorizes federal courts to enforce agreements to arbitrate).

It is improbable that the threefold increase in filings of employment discrimination claims has been caused by a threefold increase in discriminatory conduct by employers over the past eight to ten years. To the contrary, empirical evidence suggests that in today's tight labor market, employers are doing everything possible to attract and retain workers, including the creation of human resource procedures designed to encourage fairness in the workplace. *See Employers Wage War of Workplace Lawsuits; Survey Reveals Trend Toward Prevention*, PR Newswire Ass'n, Inc. (Nov. 11, 1998) (86% of U.S. Companies have created written human resource policy manuals; 63% have implemented training programs for managers and supervisors; 57% have developed employee grievance policies; 51% have hired human resource managers and 48% have purchased employment practices liability insurance).

The increase in federal filings reflects a growing demand by employees to have a neutral party review their employers' decisions. Employers, in turn, want to provide employees with fair alternatives to redress workplace problems, without resorting to the courts. Arbitration achieves this end.

The deluge of employment litigation has caused some on the federal bench to note that their purpose is not to serve as "super personnel departments." *Hasham v. California State Bd. of Equalization*, 200 F.3d 1035, 1048 (7th Cir. 2000) ("this Court has consistently avoided stepping into the role of a super-personnel department"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("this case appears to be precisely the type of employment dispute that this Court has repeatedly stated is not covered by the discrimination laws. . . . [T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel

departments"). To quell the clamor for judicial intervention into workplace disputes and to provide employers with an incentive to better manage their workplace, this Court has articulated that the law favors the institution of fair and reasonable preventative policies and procedures.

For example, in *Kolstad v. American Dental Ass'n*, this Court ruled that an employer that trains its work force regarding discrimination may avoid liability for punitive damages. *See* 527 U.S. 526, 545 (1999). Specifically, with regard to punitive damages, the Court stated, "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.' " *Id.* (citation omitted).

The Court also effectively has encouraged employers to create internal grievance procedures to redress issues of sexual harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) ("It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations [of Title VII] and give credit here to employers who make reasonable efforts to discharge their duty"); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (a defending employer may raise an affirmative defense by showing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise").

The establishment of alternative dispute resolution programs, including arbitration, works in conjunction with these decisions to further encourage and reward employers and, in

particular, direct their human resource departments to take steps to correct workplace discrimination without judicial intervention. The logical extension of these decisions, coupled with the Court's decades-long encouragement of arbitration, is to recognize arbitration as a viable and fair means of resolving workplace grievances.[7] A contrary conclusion will unravel well-established arbitration programs, as well as other employment policies and procedures.[8] SHRM, therefore, urges the Court to reverse the Ninth Circuit.

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7. More than 40 years ago, this Court ruled that an agreement to arbitrate grievances was *quid pro quo* for an agreement by a labor organization (and its members) not to strike. *See Lincoln Mills*, 353 U.S. at 455. Since this ruling, "wild cat" strikes virtually have disappeared, arguably giving the United States greater labor peace than any other nation. In contrast, the United States has more employment-based (non-union) litigation than any other country. What has worked so well in one area of employment relations (those with unions and employers) can work equally well if arbitration between employers and non-union employees is permitted.

8. The Supreme Court has, in other areas of the law, considered whether wide-spread acceptance to a practice is reason to sustain the practice. *See, e.g., Dickerson v. United States*, 120 S. Ct. 2326 (2000) ("We do not think there is such justification for overruling Miranda. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture"); *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (noting that the fact that a rule has found "'wide acceptance in the legal culture'" is "adequate reason not to overrule" it).

III.

IF THE AGREEMENT AT ISSUE IS DEEMED A CONTRACT OF EMPLOYMENT, THE COURT'S DECISION WILL JEOPARDIZE OTHER LONGSTANDING HUMAN RESOURCE POLICIES AND PRACTICES.

The FAA does not define the phrase "contract of employment."[9] Nor does the FAA's legislative history shed clear light on the meaning of this phrase. As a general matter of statutory construction, absent a definition, a word or phrase in a statute is given its plain and ordinary meaning. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (stating that the term "cognizable" was not defined under the Federal Tort Claims Act and therefore the ordinary meaning of the term shall be construed); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 552-53 (1987) (determining that the statutory language at issue was plain and nothing in the statute contradicted this plain meaning).

The plain and ordinary meaning of a "contract of employment" is one where one party agrees to employ the other and the other party agrees to such employment.[10] Respondent completed an employment application containing a provision

9. SHRM understands that the Court did not grant certiorari on the issue of whether a contract of employment exists, however, amicus believes there are serious issues which may impact on the field of human resources should the Ninth Circuit's ruling be affirmed.

10. Even in an employment contract that is terminable at will, one party agrees to employ the other (albeit for an indefinite period) and the employee agrees to being employed. *See, e.g.*, *Asmus v. Pacific Bell*, 999 P.2d 71, 80 (Cal. 2000) (a " 'specified condition' may be one for either definite or indefinite duration").

entitled "Circuit City Dispute Resolution Agreement" ("DRA"). *See Circuit City v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999), *cert. granted*, 120 S. Ct. 2004 (2000). The DRA specifically states: "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me. . . . [and] this Agreement in no way alters the 'at-will' status of my employment." *Id.* at 1071.

While the parties validly agreed to arbitrate future disputes between them in the employment application, Adams did not agree nor was he bound to work for Circuit City. Likewise, Circuit City did not agree to hire Adams. Absent either party agreeing to work for the other, the document in question cannot be considered a "contract of employment"; no employment relationship was established by the job application.

The Ninth Circuit opined that the plain and ordinary meaning of the phrase "contract of employment" could be found by looking to its own precedent, which cited BLACK'S LAW DICTIONARY's definition of an employment contract. *See Adams*, 194 F.3d at 1071 (citing *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994) (quoting BLACK'S LAW DICTIONARY 525 (6th ed. 1990)). The full citation, which the Ninth Circuit did not provide, reads: "An agreement or contract between employer and employee in which the terms and conditions of one's employment are provided." BLACK'S LAW DICTIONARY 525 (6th ed. 1990).

The circuit court, however, failed to state how the facts of this case apply to the above definition where the job application containing the agreement to arbitrate was devoid of any of the essential terms and conditions of employment. The employment application containing the agreement to arbitrate fails to evidence an agreement even to the most rudimentary terms and conditions of employment: *i.e.*, the employee's rate of pay or position.

Thus, applying the "dictionary" meaning to the phrase "contract of employment," the job application at issue simply is not an employment contract because it fails to set forth crucial terms and conditions of employment.

Employers and employees (or job applicants) routinely enter into valid agreements which are not contracts of employment: *e.g.*, agreements to adhere to work safety rules; to comply with certain human resource policies and procedures; to submit to pre-employment and post-accident drug and alcohol tests; to keep certain business information confidential; and to restrict the employee's post-employment conduct. Many of these agreements contain provisions permitting arbitration of disputes which arise in these limited areas. The Ninth Circuit's decision suggests that any type of agreement between an employee and an employer, *a fortiori*, is a contract of employment. SHRM disagrees. The Ninth Circuit's holding in *Adams* calls into doubt whether any of these ancillary employment issues could be subject to arbitration, thus requiring employers to re-evaluate virtually all of their employment policies.

CONCLUSION

For the foregoing reasons, *amicus curiae* Society for Human Resource Management respectfully requests this Court to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX — STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 185

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce s defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

42 U.S.C. § 2000e-5(b)

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the ''respondent'') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done

during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

42 U.S.C. § 12212

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Appendix

29 C.F.R. § 1601.20(a)

Prior to the issuance of a determination as to reasonable cause the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Field Management Programs, Office of Program Operations, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. When the Commission agrees in any negotiated settlement not to process that charge further, the Commission's agreement shall be in consideration for the promises made by the other parties to the agreement. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commission charge or a charge, the allegations of which are like or related to the individual allegations settled.

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No. 99-1379

IN THE

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CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CREDIT SUISSE FIRST BOSTON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CREDIT SUISSE FIRST BOSTON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

Credit Suisse First Boston ("CSFB") is one of the world's leading investment banks and employs approximately 16,000 people around the globe. In 1997, after several months of study and consultation with leading academics and private practitio-

[1] Rule 37 statements: The counsel on the brief are its sole authors and no person or entity other than Credit Suisse First Boston made any monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

ners, CSFB adopted a comprehensive Employment Dispute Resolution (or "EDR") program for its 5,400 U.S. employees in order to ensure that they had a fair, efficient, cost-effective, and confidential means of seeking redress for any perceived infringements of their employment-related legal rights.[2]

The EDR program, which took effect on January 1, 1998, requires CSFB's U.S. employees to follow a three-step process to resolve any employment-related claim other than a claim for workers' compensation or unemployment benefits. The three steps, which follow each other in sequence, are internal grievance resolution; external mediation conducted by a neutral third party; and final, binding arbitration before an independent arbitrator.

Under the first step, internal grievance resolution, CSFB's employees bring any problem to the attention of their supervisor or Human Resources representative, who then attempts to resolve the problem confidentially and informally. If the employee is not satisfied with the result, and believes that that he has a legal claim, he may initiate external mediation.

Each mediation is conducted by an experienced mediator of employment disputes supplied by JAMS/Endispute, an independent provider of dispute resolution services. The mediator is selected by mutual agreement of the employee and CSFB, or, absent such agreement, by JAMS/Endispute. To commence mediation, an employee makes a written request and pays a filing fee of $150 to JAMS/Endispute. Employees who elect mediation have the right to retain and be represented by counsel.

If the mediator is unable to bring the parties together, either party may commence final and binding arbitration. Each arbitration is conducted by a single arbitrator supplied by one of three

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[2] The Appendix to this brief reprints CSFB's Statement of Policy, which explains its EDR program in detail. CSFB provided the Statement to all of its U.S. employees on adoption of the program in 1997 and gives it to all new U.S. employees.

independent administering bodies – JAMS/Endispute, the American Arbitration Association, or the Center for Public Resources Institute for Dispute Resolution. The party that requests arbitration selects the administering body.

To ensure that its employees not only have a fair process but also perceive the process to be fair, CSFB added numerous safeguards to the EDR program. Employees have the right to retain and be represented by counsel in mediations and arbitrations. They have input in selecting the mediator or arbitrator. They bear no more than a *de minimis* level of expenses. They enjoy the opportunity for discovery pursuant to the rules of the administering body. They are entitled to a written decision by the arbitrator that sets forth the nature of the dispute and explains the factual and legal bases for the decision. They have the same statutes of limitation as would apply if the dispute were the subject of a civil action in court. And they are eligible for the same potential remedies – including injunctive relief, comprehensive damages, and attorney's fees – that would be available to them in court. As an additional safeguard, the EDR program provides that no CSFB employee, and in particular no supervisor or manager, may take any retaliatory measures against any employee who invokes the EDR procedures.[3]

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[3] Although CSFB's EDR program is sufficiently attractive that rational parties should agree to its procedures even after a dispute has arisen, the strength of the employee's claim often inclines one party or the other to resist resolution out of court. On the one hand, if a claim is weak, the employer will be disinclined to arbitrate it. On the other hand, if a claim is serious or has other characteristics that might prove attractive to a jury, the employee's attorney will be disinclined to arbitrate it. By establishing a procedure to resolve claims before they arise, predispute arbitration agreements require the employer to open a forum to all claims and demand that the employee make a realistic claim without inflation for the contingency, however remote, of a runaway jury. Because parties generally will not agree to arbitration after a dispute has arisen, out-of-court resolution of employment disputes requires judicial recognition and specific performance of predispute arbitration agreements.

CSFB's experience with its EDR program to date shows that an accessible, inexpensive, and fair process resolves more disputes, and resolves such disputes more promptly and less expensively, than if either party were able to exercise his first angry instinct to take the other party to court. Since the inception of the program two-and-one-half years ago, every employment-related dispute brought under the EDR program but one has been resolved either through the informal grievance process or formal mediation conducted by a third party. On average, CSFB's EDR program resolves disputes in only one-fifth of the time and cost of litigation.[4] Based on CSFB's experience before

[4] According to CSFB's records, employment disputes have been resolved in an average of 4 months and at a cost of $12,700 under the EDR program (from January 1, 1998, when it took effect, to July 31, 2000), compared to an average of 22 months and $63,000 during a comparable two-and-a-half-year period before the program took effect. CSFB's experience is as follows:

Type of Employment Dispute Resolution	Number of U.S. Employees	Number of Employment Disputes Resolved	Average Resolution Time Per Employee (Months)	Average Transaction Costs Per Employee ($)
Litigation/Arbitration Before EDR	4,363 (at Dec. 31, 1997)	94	22.25	63,100
EDR: Grievance	5,399 (at July 31, 2000)	35	3.75	4,000
EDR: Mediation		12	6.0	27,500
EDR: Arbitration		1 pending	Not applicable	Not applicable
EDR: Total		47 (total)	4.0 (weighted average)	12,700 (weighted average)

Average transaction costs include the mediator's or arbitrator's fees, CSFB's legal fees, and disbursements, but do not include any amount paid to resolve the employee's claim.

the EDR program took effect, many disputes that were resolved to the satisfaction of both parties by mandatory (but non-binding) mediation would likely have ended up in lengthy and costly proceedings in court. Other disputes, primarily those resolved in the informal grievance process, would likely never have been brought at all and might have festered until they had developed into more serious problems.

Because CSFB is firmly committed to the prompt, fair, confidential, and non-acrimonious resolution of the disputes that unfortunately but inevitably arise out of the collaboration of highly motivated professional and administrative staff, it has a vital interest in this Court's determination of whether pre-dispute arbitration clauses are valid and may be specifically enforced under the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case – whether the Federal Arbitration Act (the "FAA") recognizes and enforces arbitration clauses in employment contracts – is posed by this Court's reconsideration of Congress's Commerce Clause power during the Great Depression. In 1925, when the FAA's predecessor, the United States Arbitration Act, was first enacted, federal law did not recognize and enforce arbitration clauses in employment contracts. The scope section of both Acts (9 U.S.C. § 2) covered only contracts "involving [interstate and foreign] commerce." In 1925, the only workers in interstate commerce were transportation workers. The exception section of both Acts (*id.* § 1), however, excluded employment contracts to which transportation workers were parties – *i.e.*, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Accordingly, the United States Arbitration Act did not recognize and enforce arbitration clauses in employment contracts in 1925.

Beginning in 1937, however, the Court's expansion of Congress's Commerce Clause power to activities "affecting" interstate and foreign commerce expanded the FAA's scope as well. As this Court concluded in *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995), "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full," *id.* at 277; *see id.* at 279 ("They [the Act's supporters] wanted to 'get a Federal law' that would 'cover' areas where the Constitution authorized Congress to legislate, namely, 'interstate and foreign commerce and admiralty.'" (citation omitted)). As a consequence, the United States Arbitration Act expanded to recognize and enforce arbitration clauses in employment contracts of the vast majority of workers in the national economy. The question posed by this case is whether the exception section (9 U.S.C. § 1) expanded in lockstep with the scope section (*id.* § 2). We submit that it did not, for two reasons.

First, unlike the text of the scope section, which is dynamic and "expand[s] along with the expansion of the Commerce Clause power itself," *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. at 275, the text of the exception section exempts only workers employed in interstate and foreign commerce and is thus limited to transportation workers. In 1925 and since, a worker is "engaged in foreign or interstate commerce" (9 U.S.C. § 1) only if he is "employed" or "occupied" in such commerce. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (1993) (definition of "engaged"); *see* WEBSTER'S NEW INTERNATIONAL DICTIONARY 725 (1928) (same definition). A worker is employed in interstate commerce, in turn, only if he moves or facilitates the movement of interstate commerce. Accordingly, the exception section excludes from the scope of the FAA only employment contracts of workers who are actually employed in interstate commerce – that is, transportation workers.

Second, Congress's reenactment of the United States Arbitration Act as the FAA in 1947 supports reading the FAA to reach

all contracts in interstate and foreign commerce – including employment contracts – and to except only those employment contracts to which transportation workers are parties. This Court customarily construes statutes on the assumption that Congress is aware of the Court's decisions and the legal effect of the language used in the legislation. That assumption is particularly well founded when the subject is this Court's Commerce Clause decisions rendered during and in the aftermath of the Great Depression. At that time, Congress was extraordinarily sensitive to the Court's decisions regarding the scope of its power under the Commerce Clause. What is more, this Court had held – only a few years before Congress enacted the FAA – that the phrase "engaged in" commerce signaled a narrower use of Congress's power under the Commerce Clause than the term "affecting" commerce and, in particular, reached only those "employees engaged in actual work on the transportation facilities." *McLeod v. Threlkeld*, 319 U.S. 491, 494 (1943). Against that unique background, Congress's enactment of the FAA – a codification of the United States Arbitration Act that in ordinary times would be of little moment – is significant and demonstrates that Congress must have understood § 1 of that FAA to except only those employment contracts to which transportation workers are parties.

ARGUMENT

I. The Static Text of the Exception Section to the Federal Arbitration Act Did Not Expand with Congress's Commerce Clause Power and Excludes Only Employment Contracts of Workers Employed in Interstate and Foreign Commerce – *i.e.*, Transportation Workers

This Court held in *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. at 275, that the FAA's scope section, which recognizes and enforces arbitration clauses in contracts "involving commerce" (9 U.S.C. § 2), "expand[s] along with the expansion of the Commerce Clause power itself." The question presented in

this case is whether the text of the exception section, which excepts only those "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. § 1), has the capacity to grow along with the expansion of Congress's Commerce Clause power.

Some commentators assume that the exception section expanded along with the scope section. *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 298 (1996) ("As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it . . . ."); *cf.* Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2D 21, 28 (1997) ("But once the FAA is (mistakenly) expanded, what fate befalls its exclusion? Perhaps it gets bigger as well . . . ."). Contrary to their assumption, however, the text of the exception section does not have the same capacity for growth, for two reasons.[5]

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[5] Before examining the text of the exception section, it is worth noting that Congress's exception of at least *some* employment contracts compels rejection of the suggestion by the court below that such contracts are entirely outside the FAA's scope. *See Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999); *see also Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1070 (9th Cir. 1999) (*per curiam*) (following *Craft*). If the court below were correct that employment contracts are outside the scope of the FAA (§ 2), then the exception section (in § 1) would be entirely superfluous. This Court has often warned that "Judges should hesitate so to treat [as surplusage] statutory terms in any setting," *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994) (footnote omitted); *see Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("cardinal principle of statutory construction" instructs that a court has a "duty to give effect, if possible, to every clause and word of a statute" (internal citations omitted)); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."); *Moskal v. United States*, 498 U.S. 103, 109-10 (1990) ("[A] court should 'give effect, if possible, to every clause and word of a statute.'"); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("[O]ur cases express a deep reluc-

First, the text of the exception section is fairly read to except only employment contracts to which transportation workers are parties. Section 1 excepts "contracts of employment of seamen, railroad employees, or any other class of workers *engaged in* foreign or interstate commerce" (emphasis added). The meaning of "engaged" (besides its meaning in contexts of marriage, the military, and machinery) is "occupied; employed." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (1993); *accord* WEBSTER'S NEW INTERNATIONAL DICTIONARY 725 (1928). Workers "engaged in" commerce are thus those who are "occupied" or "employed" *in* commerce – that is, workers in the transportation industry – not those whose labor "involves" or "affects" commerce.

Second, reading § 1 to except only employment contracts of transportation workers also makes sense of Congress's serial listing of "contracts of employment of seamen [and] railroad employees" and its limitation of the exception in the concluding phrase to "any *other* class of workers engaged in foreign or interstate commerce" (emphasis added). If Congress had intended to except all employment contracts from the FAA, it would have excepted "contracts of employment" or, at a minimum, "contracts of employment of workers engaged in industries involving commerce" (using the same terms as in the scope section), and perhaps adding, for the avoidance of doubt, "including those contracts to which seamen and railroad employees are parties." But Congress wrote neither exception. Instead, it listed two

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tance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). The narrow reading of the scope section offered by the court below is particularly suspect. If Congress had intended to exclude employment contracts from the FAA's scope in § 2, and had added a redundant exception in § 1 – for the sake of emphasis, let us say – then Congress would have excepted "contracts of employment" categorically and not gone on to enumerate the specific contracts outside the operation of that Act. The very existence of the exception section compels the conclusion that employment contracts are within the scope of the FAA.

classes of transportation workers whose employment contracts it excepted from the FAA and added a catchall phrase limited to "other" classes of workers similarly "engaged in" commerce. Congress's choice of language thus limits the exception clause to employment contracts to which transportation workers are parties.[6]

When this Court construed Congress's Commerce Clause power more broadly beginning in 1937, the scope of the FAA increased in lockstep. Because the text of the exception section did not have the same capacity for growth – being limited to employment contracts of workers "engaged in" commerce (9 U.S.C. § 1) – arbitration clauses in employment contracts (other than those to which transportation workers are parties) became

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[6] The conclusion that the catchall phrase should be limited to employment contracts involving workers similar to seamen and railroad employees also follows from application of the canon of *ejusdem generis*. That maxim of statutory construction provides that general words following specific words are to be construed to embrace objects similar in nature to those covered by the specific words. *See Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *see also Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84 (1990); *Hughey v. United States*, 495 U.S. 411, 419 (1990) ("In light of the principal of *ejusdem generis* – that a general statutory term should be understood in light of the specific terms that surround it – the catchall phrase should not be read to introduce into the restitution calculus losses that would expand a defendant's liability beyond the offense of conviction."); *Garcia v. United States*, 469 U.S. 70, 74-75 (1984); *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 176 (1946) ("Those words ["other uses"], however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. . . . [A] proper construction of the act requires that the words 'other uses' shall be construed *ejusdem generis* with the words 'irrigation' and 'municipal.'" (internal quotation and citation omitted)); *cf. Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (holding that "catchall provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated").

as valid and specifically enforceable as any other predispute arbitration agreement.

II. Congress's Reenactment of the Federal Arbitration Act in 1947 – After This Court Had Construed "Engaged in" to Include Employees who Work on Transportation Facilities – Supports Excepting Only Those Employment Contracts to which Transportation Workers Are Parties

Although Congress wrote the FAA's scope section in words that accommodated the subsequent expansion of its Commerce Clause power, and excepted employment contracts of transportation workers in language that did not, it may seem unfair to hold Congress to the legal effect of the words it chose when no Member could have anticipated the Great Depression, the New Deal, and the dramatic expansion of Congress's Commerce Clause power. As one Justice of this Court wrote in dissent in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting): "When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply . . . to the arbitration of disputes arising out of the employment relationship." As a consequence, the Ninth Circuit focused on the FAA's legal effect on employment contracts as it would have been understood by Congress in 1925: "[T]he FAA . . . was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s. Thus, to understand whether Congress intended for the FAA to apply to employment contracts, we need to understand Congress' commerce power in 1925." *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1086 (1999); *see Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1070 (9th Cir. 1999) (*per curiam*) (following *Craft*).

Contrary to the Ninth Circuit's reasoning, the FAA should be construed as Congress would have understood its text in 1947, *after* the expansion of Congress's Commerce Clause power.

Congress did enact the United States Arbitration Act in 1925. *See* Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886 (1925) (repealed). But Congress repealed that Act and reenacted its substance (without the old short title) as title 9 of the United States Code in 1947. *See* Act of July 30, 1947, ch. 392, § 2, 61 Stat. 669, 670-674 (codified as amended at 9 U.S.C. §§ 1-16); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 24 (Congress "reenacted and codified [the FAA] in 1947 as title 9 of the United States Code"). Thus, strictly speaking, the FAA was *not* "enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s" (*Craft*, 177 F.3d at 186); instead, it was enacted in 1947, *after* that expansion had become manifest, and indeed five years after this Court decided *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942), which held that the Commerce Clause empowers Congress to regulate home-grown wheat.

Although it would ordinarily be inappropriate to read any significance into Congress's repeal and reenactment (to do so would constitute a "drag upon codification," HENRY H. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1403 (tent. ed. 1958)), and although it is true that Congress made no "material change" or "amendments" to the FAA's text in 1947 (H.R. REP. NO. 80-255, at 1 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515, 1515), the 22 years between the enactment of the United States Arbitration Act in 1925 and its reenactment as the FAA in 1947 witnessed the greatest economic catastrophe in the history of the Republic; constitutional disagreement between the Court and Congress over the scope of Congress's power to legislate against that catastrophe under the Commerce Clause; the Court's reconsideration and ultimate expansion of Congress's power; and Congress's careful exercise of that power using language calibrated to the activities it intended to reach. Against that background, it is reasonable to charge Congress with knowledge of the legal consequences of the terms with which it legislated.

Congress used the phrase "engaged in" commerce (or its cousin, "in" commerce) in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. § 45, in addition to the United States Arbitration Act. In the early 1940s, shortly before Congress reenacted the FAA, this Court construed the critical phrase (or its cousin) in four principal cases. In each case, this Court reasoned that "engaging in" commerce (or "in" commerce) was not synonymous with "affecting" commerce; that Congress's use of the former, narrower phrase reflected its intention not to exercise its full power under the Commerce Clause; and that the Acts in question reached only transportation workers – specifically, employees maintaining and operating a toll road and drawbridge over a navigable waterway (*Overstreet v. North Shore Corp.*, 318 U.S. 125, 126, 128-32 (1943)) – and not workers operating and maintaining a building used to produce goods for interstate commerce (*Kirschbaum v. Walling*, 316 U.S. 517, 518, 522-23, 525-26 (1942)), a company selling candy (*Federal Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349, 349-52, 355 (1941)), or a cook providing meals to railroad maintenance employees (*McLeod v. Threlkeld*, 319 U.S. at 492-94).

In *Federal Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. at 349-52, 355, this Court held that a candy maker's intrastate sale of confections in certain allegedly deceptive packaging was not an "[u]nfair method of competition in commerce" within the meaning of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Court observed that the FTC "unsuccessful[ly] attempt[ed] in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce." 312 U.S. at 352. The Court "h[e]ld that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifesta-

tion of intention than Congress has furnished." *Id.* at 355 (second brackets in original).

In *Kirschbaum v. Walling*, 316 U.S. at 518, 522-23, 525-26, this Court did not hold that workers operating and maintaining a building used to produce goods for interstate commerce were "engaged in" commerce, and instead held that they were "engaged in the production of goods for commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 207(a). The Court explained that "[s]ince the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce.'" *Id.* at 523. In answer to that question, the Court did not hold that the workers were "engaged in" commerce. Instead, it concluded that they were engaged in the production of goods for commerce: "In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" *Id.* at 525-26.

In *Overstreet v. North Shore Corp.*, 318 U.S. at 126, 128-32, this Court held that employees maintaining and operating a toll road and drawbridge over a navigable waterway were "engaged in" commerce within the meaning of §§ 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a) and 207(a). The Court declared that "it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce." *Id.* at 128. The Court held that the employees were "employed or engaged 'in commerce,'" because they "are engaged in operating and maintaining [the corporation's] facilities so that there may be interstate passage of persons and goods over them" and are therefore "so closely related to that interstate movement as a practical

matter that we think they must be regarded, under the allegations of their complaint, as 'engaged in commerce' within the meaning of §§ 6 and 7 of the Act." *Id.* at 132.

In *McLeod v. Threlkeld*, 319 U.S. at 492-94, this Court held that a cook providing meals to railroad maintenance employees was not "engaged in" commerce within the meaning of §§ 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a) and 207(a). Noting that "[t]he distinction in the coverage arising from this choice of language was well known to Congress" (319 U.S. at 493 n.2), the Court reasoned that by employing the phrase "engaged in commerce" Congress "did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority" (*id.* at 493). "The selection of the smaller group was deliberate and purposeful." *Id.* Summarizing the holdings of earlier cases, the Court concluded that the phrase "engaged in" commerce reached only those "*employees engaged in actual work upon the transportation facilities*" (*id.* at 494 (emphasis added)):

> [The cook] was not engaged in the production of goods for commerce. His duties as a cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause. Our question is whether he was "engaged in commerce." We have held that this clause covered every employee in the "channels of interstate commerce," *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not. Employees engaged in operating and maintaining privately owned toll roads and bridges over navigable waterways are "engaged in commerce." *Overstreet v. North Shore Corporation*, 318 U.S. 125. So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads. *Pedersen v. J.R. Fitzgerald Construction Co.*, 318 U.S. 740, 742.

319 U.S. at 493-94 (footnotes omitted). "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." *Id.* at 497. The Court held that "[t]he furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves." *Id.*

This Court "presume[s] [Congress] to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (citing numerous cases and other authority).[7] It is a small step from that presumption to the conclusion that Congress was aware of this Court's construction of the phrase "engaged in" commerce (or "in" commerce) in the Fair Labor Standards Act and the Federal Trade Commission Act and adopted that interpretation when it reenacted the same phrase in § 1 of the FAA. Although Congress reenacted the FAA without materially changing the text of the United States Arbitration Act of 1925, this Court had in the meantime held that the operative language in § 1 of the proposed FAA reached only "employees engaged in actual work upon the transportation facilities." *McLeod v. Threlkeld*, 319

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[7] *Cf. Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) ("Since Keene has given us no reason to doubt that these cases represented settled law when Congress reenacted the 'claim for or in respect to which' language in 1948, see 62 Stat. 942, we apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them."); *Commissioner of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) ("The phrase . . . had acquired a settled judicial and administrative interpretation over the course of a half century before Congress enacted . . . the even broader statutory language . . . . Congress presumptively was aware . . . that the phrase . . . consistently had been construed to include the transfer of property in satisfaction of a monetary obligation. *See Albernaz v. United States*, 450 U.S. 333, 340-343 (1981).").

U.S. at 494. In light of this Court's holding, and Congress's awareness of this Court's Commerce Clause decisions (*see, e.g.*, 83 CONG. REC. 9166-73 (daily ed. July 14, 1938)), this Court should presume that the 80th Congress understood that the only employees "engaged in" commerce are transportation workers and therefore exempted the employment contracts only of transportation workers when it reenacted the FAA in 1947.

* * * * *

By enacting the FAA, Congress completed the legislation needed to enable private parties to resolve their disputes out of court. In 1872, Congress provided for the arbitration of employment disputes involving seamen. *See* Act of June 7, 1872, ch. 322, § 25, 17 Stat. 267 (codified as amended at 46 U.S.C. app. § 651) (repealed 1983). In 1920, Congress provided for the arbitration of employment disputes involving railroad employees. *See* Transportation Act, 1920, Pub. Law No. 66-152, tit. III, 41 Stat. 456, 469-474; *see also* Railway Labor Act § 7, 45 U.S.C. § 157 (*semble*). And in 1925 and 1947, Congress required courts to recognize and enforce agreements to arbitrate disputes in interstate and foreign commerce (9 U.S.C. § 2), excepting only "the two groups of transportation workers as to which special arbitration legislation already existed and . . . all other similar classes of workers" (*Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F. 2d 450, 452-53 (3d Cir. 1953) (construing 9 U.S.C. § 1).

CSFB's EDR program is entirely in keeping with the march of legislation in favor of consensual dispute resolution and demonstrates that judicial enforcement of employment-dispute-resolution programs is not just good law, but good policy. CSFB's carefully developed, even-handed program has reduced the time and cost needed to resolve disputes by 80 percent. To those tangible savings should be added the intangible benefits to the parties of resolving their disputes by mutual agreement and in confidence with the help of experienced and neutral third-party mediators.

To realize their potential, however, employment-dispute-resolution programs should meet minimum standards. They should communicate effectively the programs' terms to ensure agreement. They should build into the process an early-detection capability to discover, prevent, and quickly address offensive conduct (*e.g.*, by an internal grievance process). They should encourage amicable resolution of disputes and avoid the hostilities engendered by litigation (*e.g.*, by mandatory but non-binding mediation before an experienced neutral). And they should culminate in an adjudicative process, short of litigation, to provide finality to the procedure. CSFB's experience shows that such a program makes for a better place to work.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENT OF POLICY
CREDIT SUISSE FIRST BOSTON
EMPLOYMENT DISPUTE RESOLUTION PROGRAM

The Program

The Credit Suisse First Boston Employment Dispute Resolution Program (the "*Program*") is a three-step program of dispute resolution procedures. It is designed to provide employees located in the United States with an opportunity to resolve employment-related claims in a speedy, cost-effective, and confidential manner.

The three steps of the Program are an internal grievance procedure; mediation with a neutral third party; and final and binding arbitration before a neutral third party. Effective January 1, 1998, these procedures are the only means by which Credit Suisse First Boston employees located in the United States are able to seek resolution of employment-related claims of the type covered by the Program. They may not sue in court as to these claims.

The Types of Claims That Are Covered

All present and future claims against the Credit Suisse First Boston Business Unit (including each of its past, present, and future legal entities, and its and their past, present and future directors, officers, and employees, in both their personal and their institutional capacities) ("*Credit Suisse First Boston*") by an applicant for employment, an employee, or a former employee are covered by the Program if: (i) they relate to or arise from the applicant's, employee's, or former employee's application for employment, employment, or termination (including manner of termination) of employment, or from events occurring after termination but relating to one of the foregoing, and

(ii) they assert the violation or infringement of a legally protected right. The only types of employment-related claims that are *not* covered by the Program are claims for workers' compensation and claims for unemployment benefits. These will continue to be handled in accordance with applicable workers' compensation and unemployment laws.

Claims of the type covered by the Program, as described in the foregoing paragraph, are hereafter referred to as "*Employment-Related Claims*." Employment-Related Claims include, without limitation, all employment-related claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans with Disabilities Act, the Employee Retirement Income Security Act, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Family and Medical Leave Act, or any other federal, state, or local statute, ordinance, regulation, or common law rule or decision regarding employment discrimination, civil rights, human rights, conditions of employment, or termination (including manner of termination) of employment, as the foregoing may from time to time be amended. State and local laws that are covered include, also without limitation, the laws of New York, California, Illinois, Texas, Florida, Georgia, Massachusetts, Pennsylvania, and any other state or any locality where Credit Suisse First Boston has, had, or may at any time have an office. Hereafter the term "*employee*" is used to refer to both former employees and current employees and to applicants for employment.

Other Important Information

- Credit Suisse First Boston personnel are specifically prohibited from taking any retaliatory action against an employee who has sought to use the Program. Violations of this rule will be treated with the utmost seriousness. Any employee who believes that he or she has been retaliated against for

using the Program should immediately notify the Human Resources Department or the Legal and Compliance Department.

- Adoption of the Program and an employee's use of the Program will not affect an employee's status as an at-will employee, and will not limit Credit Suisse First Boston's ability to take disciplinary or other personnel action against the employee. If an employee believes he or she has an Employment-Related Claim against Credit Suisse First Boston as a result of its taking any such action, the employee may institute proceedings under the Program, but may not sue in court.

- Credit Suisse First Boston reserves the right to amend or repeal the Program at any time, upon notice. No such amendment or repeal will affect the applicability of the Program to Employment-Related Claims that arose before the effective date of the amendment or repeal.

- Establishment of the Program does not affect an employee's right to pursue, in accordance with applicable law, any administrative agency process that may be available to the employee

- If a registered representative is subject to a legal requirement that he or she arbitrate Employment-Related Claims pursuant to particular rules or in a particular forum (for example, at or pursuant to the rules of a stock exchange), to the exclusion of other forums and rules, that requirement will prevail over the arbitration procedures described herein. Registered representatives will, however, in any event be subject to the Program requirements regarding the internal grievance procedure and mediation, including the requirement that they seek resolution of Employment-Related Claims pursuant to those procedures, in accordance with the Program, before proceeding to arbitration.

The Three Steps

Step One of the Program is the internal grievance procedure. Step Two is mediation before a neutral third party. Step Three is final and binding arbitration before a neutral third party. The three steps must be taken in sequence. The procedures an employee must follow to initiate each of the three steps and the manner in which proceedings pursuant to each step will be conducted are explained below.

Step One - Internal Grievance Procedure

If an employee believes he or she may have an Employment-Related Claim against Credit Suisse First Boston, the employee should first, and as promptly as possible, bring the problem to the attention of an appropriate person at Credit Suisse First Boston. Generally an employee's supervisor will be in the best position to understand and resolve a problem because he or she is most likely to be familiar with the employee's working situation and to know the other personnel in the employee's department. The first person an employee speaks to should therefore usually be his or her supervisor. If an employee does not feel comfortable speaking to his or her supervisor (because, for example, he or she believes the supervisor is part of the problem), he or she should take the issue to the supervisor's supervisor or to another appropriate person above the supervisor in the department's chain of command. Instead of directly approaching a supervisor, an employee may also, at any point in the process, contact his or her Human Resources representative to discuss the issue. Supervisors with whom issues are raised should contact their Human Resources representatives for assistance in resolving such issues.

As a matter of Credit Suisse First Boston policy, all employment-related issues that are raised in connection with the foregoing dispute resolution procedure are to be handled confidentially to the extent reasonably practicable under the circumstances. Often the matter can be dealt with by a supervisor without his or

her bringing anyone else (other than, in appropriate cases, a member of the Human Resources Department) into the discussions. At other times it may be necessary that another manager or other employees be consulted in order to resolve the matter. All supervisors, managers, and other employees are specifically prohibited from taking any retaliatory action against an employee who has raised an Employment-Related Claim and sought to utilize the foregoing procedure or any of the other dispute resolution procedures set out in the Program.

As explained below, Steps Two and Three of the Program may be used only in connection with Employment-Related Claims against Credit Suisse First Boston. Step One of the Program may, however, be used not only in connection with Employment-Related Claims but also in connection with any other employment-related grievances an employee may have.

Step Two - External Mediation

If an employee raised an Employment-Related Claim through the Step One internal grievance procedure and believes the dispute was not satisfactorily resolved through that procedure, he or she may elect to proceed to Step Two. Step Two consists of the mediation of an Employment-Related Claim by a neutral third party. To elect to proceed to mediation, an employee must make a request for mediation in the manner described below. Credit Suisse First Boston may also request mediation of an Employment-Related Claim asserted by an employee.

An employee may request mediation *only* in respect of an "Employment Related Claim," as that term is defined above. Within Credit Suisse First Boston, the Human Resources Department, in consultation with the Legal and Compliance Department, will be responsible for resolving questions about whether a particular claim meets the definition, including whether it involves the assertion of the violation or infringement of a legally protected right.

What Mediation Is

In mediation, the parties (and, if they so choose, their attorneys) meet in a confidential setting with a neutral third party, the mediator. The mediator encourages the parties to discuss their differences and assists them in developing a resolution that is satisfactory to each of them. If the parties are able to resolve their dispute through the mediation process, they typically set forth the terms of their agreement in a legally binding writing.

Mediation is widely considered a much more effective and appropriate means than litigation for resolving employment disputes. The proceedings are private, confidential, and flexible. If the dispute is resolved, the resolution is not one that was imposed on the parties but rather is one both parties played a part in designing and to which they both agreed. Often the parties are able to resume an amicable relationship after the resolution is achieved.

Conduct of Mediation

All mediations pursuant to the Program will be conducted by a single mediator supplied by JAMS/Endispute, an independent provider of dispute resolution services. The mediator will be experienced in resolving disputes involving employment issues.

Making a Request for Mediation

To make a request for mediation under the Program, an employee must submit a written request to his or her Human Resources representative and to JAMS/Endispute and pay a filing fee of $150 to JAMS/Endispute. A copy of the request form is available from the Human Resources Department.

Time Period for Making Request

A request for mediation under the Program must be filed within six months of the time that the complained of action or actions took place, or during such longer period as is allowed by

any applicable statute of limitations. If an employee does not file his or her request for mediation within the required period, he or she will forfeit any further right to make use of the Program and will be foreclosed from bringing an action in any court on the Employment-Related Claim. Employees with questions about the applicable statutes of limitations may contact their Human Resources representatives.

Step Three - Final, Binding Arbitration

It is Credit Suisse First Boston's expectation that most Employment-Related Claims will be resolved through Step One or Step Two. If, however, an employee has made an effort to resolve such a claim through mediation in accordance with Step Two but the mediation proceedings have not resulted in a resolution, the employee may proceed to Step Three, final and binding arbitration. To elect to proceed to arbitration, an employee must make a request for arbitration in the manner described below. Final, binding arbitration will be an employee's exclusive remedy for resolving an Employment-Related Claim that was mediated unsuccessfully.

Credit Suisse First Boston may also initiate an arbitration of an Employment-Related Claim asserted by an employee if mediation of the claim has not resulted in a resolution. Both the employee and Credit Suisse First Boston will be bound by any decision rendered by an arbitrator pursuant to Step Three, subject to the right to seek judicial review of the decision in accordance with applicable law.

What Final, Binding Arbitration Is

Final, binding arbitration is a process in which a dispute is presented to a neutral third party, the arbitrator, for a final and binding decision. The arbitrator renders a decision after listening to both parties present evidence and their arguments.

Arbitration is less formal than a court trial and generally is much quicker. It is, however, an orderly proceeding, governed by rules of procedure and legal standards of conduct. Each party has the right to at least a minimum amount of discovery, to present his or her proof, through testimony and documentary evidence, and to cross-examine the other party's witnesses. The arbitrator's decision is legally enforceable. In other words, the party to whom relief is granted may, if the other party does not comply with the terms of the award, sue in court to enforce the award.

Conduct of Arbitration

All arbitrations under the Program will be conducted by a single arbitrator supplied by JAMS/Endispute, the American Arbitration Association, or the Center for Public Resources (CPR) Institute for Dispute Resolution ("*Service Providers*"). The arbitrator will be selected, and the arbitration proceeding will be conducted, in accordance with the rules and procedures of such Service Provider applicable to the arbitration of employment disputes (the "*Employment Arbitration Rules*" of such entity), as such rules and procedures are then in effect. JAMS/Endispute, the American Arbitration Association, and CPR Institute for Dispute Resolution are all independent, experienced providers of arbitration services. The party that first requests an arbitration will choose which of the three Service Providers will be used for the proceeding. Copies of the three Service Providers' current Employment Arbitration Rules are available from the Human Resources Department.

Making a Request for Arbitration

To make a request for arbitration under the Program, an employee must submit a written request to his or her Human Resources representative and to the Service Provider he or she has selected and pay the Service Provider a filing fee of $150. A

copy of the request form is available from the Human Resources Department.

Time Period for Making Request

A request for arbitration under the Program must be filed within six months of the time that the complained of action or actions took place, or during such longer period as is allowed by any applicable statute of limitations. The time that elapses from when a request for mediation is filed pursuant to Step Two of the Program until five days after the employee gives Credit Suisse First Boston written notice, or Credit Suisse First Boston gives the employee written notice, that, in such party's view, the mediation proceedings are not likely to result in a resolution, will not be counted in calculating the time remaining in the applicable period. If an employee does not file his or her request for arbitration within the required period, he or she will forfeit any further right to make use of the Program and will be foreclosed from bringing an action in any court with respect to the Employment-Related Claim. Employees with questions about the applicable statutes of limitations may contact their Human Resources representatives.

Additional Mediation and Arbitration Rules and Procedures

The following additional rules and procedures will apply to any mediation or arbitration under the Program:

1. *Representation by Counsel.* An employee will have the right to be represented by counsel. An employee who chooses to be represented by counsel will be responsible for paying the fees and disbursements of such counsel.

2. *The Mediator or Arbitrator.* The mediator or arbitrator will be experienced in employment law and will be neutral and impartial. Any mediator will be selected by agreement of the employee and Credit Suisse First Boston from a panel provided by the Service Provider. If the employee and Credit Suisse First Boston cannot agree

on a mediator, the Service Provider will make the selection in accordance with its procedures as then in effect.

3. *Expenses.* There will be various expenses associated with a mediation or arbitration, such as the mediator's or arbitrator's daily fees and travel expenses. In the case of a mediation or arbitration proceeding initiated by an employee whose gross compensation (including bonus) for the calendar year preceding the year in which the proceeding was initiated was less than $150,000, Credit Suisse First Boston will, in the case of each such proceeding and with the employee's request, bear all of such expenses that are in excess of the initial filing fee for the proceeding. In the case of a mediation or arbitration proceeding initiated by an employee whose gross compensation (including bonus) for the calendar year preceding the year in which the proceeding was initiated was $150,000 or more, Credit Suisse First Boston will, in the case of each such proceeding and with the employee's consent, bear all of such expenses that are in excess of the initial filing fee for the proceeding plus one day's of the employee's gross cash compensation (including bonus) for such preceding year (calculated by dividing the amount of such total gross cash compensation by 365/6).

   Each party will be responsible for the fees and disbursements of its own counsel and the expenses relating to the production of witnesses or other evidence by it.

4. *Location of a Mediation or Arbitration.* Any mediation or arbitration will be held in the New York City metropolitan area or, at the employee's request and with Credit Suisse First Boston's consent, in the location of the Credit Suisse First Boston office where the employee applied for a position or works or worked when the complained of action or actions took place. If the proceeding takes place other than in the location of the

office where the employee applied for a position or works or worked when the complained of action or actions took place, Credit Suisse First Boston will reimburse the expenses of the employee and any witnesses produced by him or her in an arbitration for their expenses incurred in connection with traveling to the site of the proceeding.

5. *Governing Law.* The law applied by a mediator or arbitrator will be the laws of the State of New York, without regard for the conflicts of laws principles thereof.

6. *Authority of Arbitrator.* In the case of an arbitration, the arbitrator's authority will be limited to the resolution of legal disputes between the employee and Credit Suisse First Boston. He or she will be bound by and will be required to apply all applicable law, including that relating to the allocation of the burden of proof and remedies for violations of such law, if any, as well as all points of substantive law. He or she will have no authority either to abridge or to enlarge substantive rights available under existing law.

7. *Arbitrator's Decision in Writing.* The arbitrator will be required to render a written award that identifies the parties, summarizes the issues in controversy, and sets forth the decision of the arbitrator and the factual and legal bases for the decision.

(10)

No. 99-1379

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ Of Certiorari to the
United States Court Of Appeals
for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE

This *amicus curiae* brief is submitted in support of the Petitioner Circuit City Stores, Inc. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. The Chamber serves as the principal voice of the business community. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business. The Chamber has a particular interest in this case since it addresses an issue of great concern to its members - the enforceability of pre-dispute arbitration clauses, which are used by many Chamber members.

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber of Commerce of the United States of America states that this brief was prepared in its entirety by the Chamber and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than the Chamber, its members or their counsel.

SUMMARY OF ARGUMENT

The ancient adage that "justice delayed is justice denied" is at the core of our legal tradition, finding its roots in the Magna Carta, which provided that "justice be to none denied or delayed." *Strachan v. Colon*, 941 F.2d 128 (2d Cir. 1991)(citing 1 W.S. Holdsworth, *A History of English Law*, 57-58 (3d ed. 1922)). Perhaps in no area of civil law does this legal principle carry more substance than in the application of laws governing the workplace. During the past 40 years, the workplace has witnessed an explosive burst of lawmaking, regulation and adjudication at the federal, state and local levels by which the diverse elements of our workforce have been provided with protections and rights. These developments did not occur in one overarching legislative act, a "big bang" of employment legislation, but rather in separate, successive acts, by which individual status rights were recognized and protected.

Thus, beginning with the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Employee Retirement Income Security Act; through the Employee Polygraph Protection Act, the Worker Adjustment and Retraining Notification Act, the Americans with Disabilities Act, the Civil Rights Act of 1991 and the Family Medical Leave Act, several additional statutes, as well as the detailed regulatory schemes accompanying these laws and the case law built thereon, the American workplace has become perhaps the most regulated area of common human activity.

Since this regulatory structure was developed in a piecemeal fashion, these laws have different procedural requirements, governmental agency involvements,

enforcement schemes and remedies. And this federal structure is often mirrored by state and local regulatory and enforcement schemes, with their own procedural requirements and independent remedies, which apply in tandem with the federal requirements. The courts have extended workplace protections through recognition of various common law actions, sounding in both tort and contract. For both the employers who must comprehend and follow this complex mosaic of laws and the employees who look to them for protection, the complexity of the workplace regulatory scheme is particularly challenging.

The purpose of underscoring the complexity of the law of the workplace is not to question the various rights and protections thereby established. Rather, it is to provide an understanding of a basic principle. This extraordinarily complex structure has been built to ensure a very simple premise: that each individual employee be treated fairly and equitably in the workplace and that each employer understand what is expected to achieve this result. Yet, the very complexity builds in delays and confusion. And when the ultimate forum for resolution of employment disputes is the courts, already burdened by growing caseloads of criminal and civil matters, expeditious resolution is often impossible. The result is that the intended benefits of these laws are often dissipated by interminable legal jousting and the necessity to find a place in an impossibly crowded court system. Employees who are attempting to secure their rights or redress grievances, and the employers who desire to understand their obligations and conduct their businesses accordingly, are forced into an endless legal contest which often freezes the employment relationship into a perpetual state of conflict and confusion. Perhaps the current morass of employment adjudication was best described by Charles Dickens when he

wrote about another litigation one hundred and fifty years ago:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; *innumerable* old people have died out of it. Scores of persons have deliriously found themselves made parties to Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit.

Charles Dickens, *Bleak House* 4 (Bantam Classic ed., Bantam Books 1983 (1853).

It cannot have been intended by the authors of our unique employment statutes that the parties would become like Jarndyce and Jarndyce. Yet without a fair, expeditious and economical dispute resolution process, that is precisely what will happen to our employment law process. Therefore, alternative dispute resolution processes, including arbitration, which satisfy due process and fairness requirements and ensure that statutory rights and remedies are enforced, should be preserved. The Ninth Circuit's interpretation of the

Federal Arbitration Act, ("FAA") which stands alone among the federal courts that have reviewed this issue, is unnecessarily cramped and restricted, and at odds with the language of that statute, the policies underlying the encouragement of alternative dispute resolution mechanisms, including contractual arbitration, and the basic public policy which encourages fair and rapid resolution of employment disputes.

ARGUMENT

I. SECTION 1 OF THE FEDERAL ARBITRATION ACT DOES NOT EXCLUDE ALL CONTRACTS OF EMPLOYMENT FROM ITS COVERAGE

With the exception of the Ninth Circuit,[2] every United States Court of Appeals that has addressed the scope of the FAA's "workers engaged in . . . interstate commerce" exclusion has concluded that a narrow construction of 9 U.S.C. § 1 to include only employees actually engaged in the channels of interstate commerce comports with the plain meaning of the statute and federal policy favoring arbitration. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*,

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[2] *Craft v. Campbell Soup Company*, 177 F.3d 1083 (9th Cir. 1999).

71 F.3d 592, 600-01 (6th Cir. 1995); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356-58 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *Cole v. Burns Int'l Sec.* Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997).

The plain meaning of the § 1 exclusion, which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," is that three categories of employment contracts are excluded from the Act's coverage: (1) seamen; (2) railroad employees; and (3) "any other class of workers engaged in foreign or interstate commerce." Well-settled precepts of statutory construction support the conclusion that the § 1 exclusion is properly interpreted as narrow. Under the rule of *ejusdem generis,* the phrase, "any other workers engaged in foreign or interstate commerce," takes its meaning from the specific terms preceding it, "seamen" and "railroad employees." Therefore, it includes only those other classes of workers who are likewise engaged directly in commerce; that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. *Cole*, 105 F.3d at 1471.

A narrow construction of § 1's exclusion also comports with the cardinal principle of statutory construction that instructs that a court has a "duty to give effect, if possible, to every clause and word of a statute." *Bennett v.*

Spear, 520 U.S. 154, 173 (1997). If the phrase "any other class of workers engaged in foreign or interstate commerce" is interpreted to extend to all workers whose jobs merely have any effect on commerce, then the specific inclusion of "seamen and railroad workers" is rendered altogether redundant and unnecessary. Had Congress intended to exclude all employment contracts from coverage under the Act, it could simply have said "nothing herein shall apply to contracts of employment."

As a matter of statutory construction, the phrase "involving commerce" used in § 2 of the FAA, has a different and broader meaning than the phrase "in commerce" in § 1. In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995), this Court stated:

> The initial interpretive question focuses upon the words "involving commerce." These words are broader than the often-found words of art "in commerce." They therefore cover more than "'only persons or activities within the flow of interstate commerce.'" . . . After examining the statute's language, background, and structure, we conclude that the word "involving" is broad and is indeed the functional equivalent of "affecting."

Consequently, the exclusion in § 1 that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged *in* foreign or interstate *commerce*," should be given

a narrow interpretation, not one that excludes from the FAA's coverage *all* contracts of employment.

The Ninth Circuit's analysis in *Craft,* relied upon in the decision below, is fundamentally flawed because it relies on the "theoretical musings" of legal commentators who similarly equate the words "involving commerce" with the words of art "in commerce." Thus, the Ninth Circuit supports its decision, not pursuant to settled case law, but with the flawed analysis by Matthew W. Finkin:

> The [FAA] exempts contracts of employment, all contracts of employment, over which Congress had constitutional authority. * * * As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it, leaving the status of employees' contracts in practical effect just as they were when the Act passed. The contrary (though prevailing) view produces an anomaly.

Craft, 177 F.3d at 1089 n.8. The conclusion that the scope of the exemption has expanded along with the expansion of the commerce power is based upon the presumption that "involving commerce" means the same thing as "in commerce," which it does not.

The Ninth Circuit also relies on Richard A. Epstein whose analysis is similarly flawed:

> But once the FAA is (mistakenly) expanded, what fate befalls its exclusion? . . . Under current law, the right answer is that the FAA keeps to its 1925 contours. . . . By venturing into the waters of partial translation, both sides to the present dispute get the arguments confused. First, they wrongly expand the coverage, "involving commerce" to keep the FAA in play; then they give the 1925 exemption its 1925 plain meaning.

Craft at 1088 (citing Richard A. Epstein, *Fidelity Without Translation*, 1 Green Bag 2d 21, 27-29 (1997)). Yet if "involving commerce" has a broader meaning than the words of art, "in commerce," as this Court has said, then there is no inconsistency or anomalous result in interpreting § 2 of the FAA to apply to the reach of the commerce power, and interpreting the § 1 exclusion narrowly, to apply only to workers actually engaged in the flow of interstate commerce.

The Ninth Circuit's decision in *Craft,* on which the lower court in the present case relied, further reflects the view that the FAA should be interpreted in terms of Congress' understanding of the limits of the commerce power in 1925. This Court rejected this argument in *Allied-Bruce Terminix*, where it explained that it would expand the scope of § 2 of the FAA, along with the expansion of the commerce power, even though when the FAA was enacted, the commerce power was much narrower:

> The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as it has turned out to be the case.

> But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively--as, for the reasons set forth above, we do here.

Id. at 275. Not only is it appropriate for courts to interpret statutes in this manner, it is essential if courts are to maintain consistency and prevent chaos in the law.

As for *Craft's* reliance on the legislative history of the FAA, the statute is not ambiguous, such that there is no need or justification to turn to scant legislative history. *See Cole*, 105 F.3d at 1472 ("in a case such as this, where the statutory text does not admit of serious ambiguity, . . . legislative history is, at best, secondary and at worst irrelevant."). Moreover, the legislative history does not evidence that Congress intended to exclude from the Act's coverage all contracts of employment. Since its enactment in 1925 the FAA has been reenacted, and in the intervening years, when the scope of the commerce power expanded, Congress has not seen fit to amend the FAA to expressly exclude from its scope all employment contracts.

Finally, although this Court has never reached the issue of § 1's scope, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, n. 2 (1991), and did not analyze the arbitration agreement at issue in *Gilmer* as an employment contract, the result, i.e. enforcement of an agreement to arbitrate all employment-related claims that was entered into as a condition of employment, suggests that the FAA does not

exclude all contracts of employment. Certainly, "it would be anomalous to compel arbitration of Gilmer's employment claims simply because the arbitration agreement was not formally part of a 'contract for employment.'" *Cole*, 105 F.3d at 1472.

II. SECTION 1 OF THE FAA SHOULD BE INTERPRETED NARROWLY BECAUSE FEDERAL POLICY FAVORS ARBITRATION

A. Courts Have Long Recognized The Federal Policy Favoring Arbitration

A narrow construction of the exclusionary clause is consistent with the underlying purpose of the Act, which is to favor arbitration. In substance, the FAA mandates that arbitration agreements contained in contracts involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and provides for orders compelling arbitration when one party fails to comply with a valid arbitration agreement. 9 U.S.C. § 4. The history of the FAA's interpretation in this Court reflects a clear disposition to interpret its application broadly. *See Gilmer*, 500 U.S. at 24 (finding that the Act was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and to place arbitration upon the same footing as other contracts" and that the "presumption of arbitrability" elevates arbitration agreements to a preferred position over other contracts); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the [FAA]

was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("[W]e not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.").

B. Arbitration Should Be Favored Because The Federal Civil Rights Statutes Contemplate Alternative Dispute Resolution

Recognition that justice delayed is justice denied is reflected in the Civil Rights Act of 1991, which expressly provides in § 118 that: "[w]here appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." This principle is also reflected in the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., which authorized a formal program of alternative

dispute resolution at the federal trial court level out of Congress' recognition that arbitration should be encouraged because of the advantage it enjoys over litigation in more promptly resolving disputes. In § 2 of the Act, "Findings and Declaration of Policy," Congress found in pertinent part:

> (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
>
> (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently;
>
> * * *

Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651.

The policy issues surrounding arbitration have generated extensive commentary. This Court has framed the inquiry in terms of whether the prospective litigant is able to

exercise his substantive rights under the applicable civil rights statute in the arbitration. *See Gilmer*, 500 U.S. at 28 ("So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). Over the last few years, this Court has repeatedly found that statutory rights of action are vindicated in the arbitral forum, and hence have held arbitration agreements enforceable to claims under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.; § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2); and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. *See Gilmer*, 500 U.S. at 26 (citing *Mitsubishi*, 473 U.S. at 614; *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987); *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)); *see also Perry v. Thomas*, 482 U.S. 483 (1987). Following this Court's example, lower courts have held arbitration agreements enforceable in cases arising under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612. *See O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).

It is against the background of a "federal policy favoring arbitration," *Gilmer*, 500 U.S. at 26, that the applicability of a mandatory pre-dispute agreement to arbitrate an employment dispute between an employer and an employee must be measured. Having engaged in a detailed analysis of the applicability of pre-dispute arbitration provisions in statutory discrimination matters, the First

Circuit has held: "While people may and do reasonably disagree about whether pre-dispute arbitration agreements are a wise way of resolving discrimination claims, there is no 'inherent conflict' between the goals of Title VII and the goals of the FAA." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc* , 170 F.3d 1, 11 (1st Cir. 1999)(citing *Gilmer*, 500 U.S. at 26, quoting *McMahon*, 482 U.S. at 227 (1987)). In *Cole*, 105 F.3d at 1486 n.19, Chief Judge Edwards of the D.C. Circuit emphasized the *Gilmer* Court's admonition that in evaluating the enforceability of compulsory arbitration, it is necessary to ask whether compulsory arbitration of Title VII claims would be inconsistent with the statutory framework and purposes of Title VII. Once the procedural fairness and due process of the arbitration are established, there should be no impediment to the utilization of the well-established alternative to court adjudication. *See Cole*, 105 F.3d at 1485.

III. FEDERAL POLICY FAVORING ARBITRATION IS WELL FOUNDED BECAUSE ARBITRATION ALLOWS CLAIMS TO BE RESOLVED FAIRLY, QUICKLY AND INEXPENSIVELY

The decision of the Ninth Circuit, interpreting the FAA to exclude from its scope virtually all claims concerning the employment relationship, is inconsistent with the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25; *Moses H. Cone*, 460 U.S. at 24. The very purpose underlying the FAA's enactment in 1925 was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by

American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24.

This Court has made clear that arbitration agreements, enforceable under the FAA, may encompass statutory claims concerning the employment relationship, including those alleging employment discrimination. *Id.* at 26. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

With the increasing use of arbitral fora to resolve statutory employment claims has come evidence that the "trade-off" made by employees who entered into arbitration agreements has been largely to their benefit. Discrimination claims brought in arbitration are resolved more quickly and inexpensively than those brought in court; such claims are more fully aired in arbitration as they are rarely dismissed prior to arbitration hearings, and such hearings are unconstrained by strict adherence to the rules of evidence; and, in fact, employees prevail more frequently before arbitration panels than before juries. And for employers, the recourse to alternative dispute resolution processes culminates in expeditious and economical resolution of workplace issues so that the business of the workplace may continue.

The comprehensive federal legislation of the last few decades governing all aspects of the employment relationship has resulted in an explosion of employment-related litigation, which has clogged the federal courts. *See, e.g.*, Report of the

Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am. L. 9, 88-89 (some judges surveyed believe that small cases brought by individual claimants, including employment discrimination cases, "clog the federal courts and divert the attention of judges away from larger, more significant civil cases" and that the resultant caseloads "will require an increased number of judges, destroying the collegiality and cohesiveness of the federal bench")(*cited in* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. Ill. L. Rev. 583, 593 n.64).

Data derived from the annual reports of the Administrative Office of the United States Courts shows that federal court filings of employment cases jumped from approximately 3.9 percent of all such filings in 1991 to 8.6 percent of all filings in 1998. Similarly, civil rights[3] filings escalated from 9.2 percent in 1991 to 15.4 percent in 1998. And, because of the general increase in litigation during the past decade, the raw numbers are even more revealing. In 1991, 8,102 federal employment cases were filed. By 1998, that number jumped nearly threefold to 24,111. Civil Rights filings multiplied from 19,100 in 1991 to 43,187 in 1998.[4]

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[3] "Civil rights" filings include complaints alleging employment discrimination, as well as housing, accommodation, welfare and voting discrimination. 13 Daily Lab. Rep. A-1 (BNA) (Jan. 20, 2000).

[4] Statistics gathered from Admin. Office of the United States Courts, 1975-98.

As a result, employment discrimination cases filed in court can take years before reaching juries. The truism that "justice delayed is justice denied" is demonstrated daily in the federal courts. According to one survey, the average length of a discrimination action, from filing to award, in the Southern District of New York was 27.5 months, as compared to comparable arbitrations filed before the New York Stock Exchange and the National Association of Securities Dealers, Inc. which took 15.6 months and 17.8 months respectively. *See Mandatory Arbitration Agreements in Securities Industry Employment Contracts: Hearings before the Comm. on Banking, Housing, and Urban Affairs*, July 3, 1998, at iv (written statement of Stuart J. Kaswell, General Counsel, Securities Industry Ass'n).[5] When the time associated with exhausting administrative remedies in advance of court action and litigating post-judgment appeals is factored in, the average duration of litigation more than doubles the average duration of arbitration.

Delays in court proceedings not only take a financial and emotional toll on the litigants, but compromise the ability of out-of-work employees to pay their legal bills. *See* Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements are an Effective Alternative to Employment Litigation*, 52 Disp. Resol. J. 19, 22 (1997); *see also* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. Cooley L. Rev. 1, 7-8 (1998). Many blue collar and non-managerial claimants are unable to secure counsel, who are often

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[5] Available at: www.sia.com/government_relations/html/stuart_testimony.html.

reluctant to enter into contingent fee arrangements with employees whose potential recovery does not justify the substantial time and expense called for in discovery-intensive discrimination cases.[6] By bringing disputes to a prompt and final disposition, both sides avoid the substantial disruption to lives and businesses inherent in the long duration of court proceedings.

Furthermore, of the many employees who go to court, few see their cases ever come to trial. Employment claims are often disposed of on motions to dismiss or summary judgment, as well as other procedural barriers that stand between employees and juries. According to the U.S. Justice Department's Bureau of Justice Statistics, employment discrimination complaints filed in federal court that reached disposition by trial declined from 9 percent to 5 percent between 1990 and 1998. 13 Daily Lab. Rep. A-1 (BNA) (Jan. 20, 2000). On the other hand, parties to an arbitration can be relatively certain that their dispute will be considered on the merits after a full hearing. *See Cole*, 105 F.3d at 1488

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[6] According to one estimate, arbitration as opposed to litigation of employment claims results in a fifty percent cost savings to the parties. *See* Garry G. Mathiason, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, Q227 ALI-ABA 23, 41 (1994). The same study concluded that the average duration of an arbitration claim is 8.6 months, compared to three to eight years for litigation claims. *See id.* (*citing* Elizabeth Rolph, et al., Inst. For Civil Justice, *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles*, 18-19 (1994)).

("Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts.")

Data comparing the success rate of employees in arbitration versus their counterparts who file discrimination claims in court also demonstrates the benefits of the arbitral forum for employees. According to one study examining the results of AAA arbitrations in employment cases between 1993 and 1995, employees prevailed in 63 percent of those cases. *See* Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189, 213 (1997). This is a far greater rate of success than employees realize in court. *See* Lewis Maltby, *Employment Arbitration: Is it Really Second Class Justice?*, Disp. Resol. Mag., Vol. 6, No. 1, Fall 1999, at 23.

Though average awards to employees are higher when made by juries than by arbitrators, this fact must be placed in the context of the reality that between 1990 and 1998 the percentage of employment discrimination actions which actually culminated in a plaintiff's verdict dropped from a low 2 percent to a scant 1.6 percent. *See* 13 Daily Lab. Rep. A-1 (BNA) (Jan. 20, 2000). A more illuminating comparison is this: during a similar period, the entire class of employees who took their disputes to court collectively received 10.4 percent of their total demands, while employees who took their disputes to arbitration received 18 percent of their total

demands.[7] *See* Maltby, *supra* at 24. According to Lewis Maltby, who compiled this data:[8] "[F]ar more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." *Id.*

Given these facts, the contention that mandatory arbitration agreements are contrary to public policy because they disfavor employees, rings hollow. Critics of arbitration often point to the limited provisions for discovery in

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[7] The expedited process and greater confidentiality of arbitration lead to an additional remedial benefit. Employees are more likely to be in a position to remain with or return to the employer upon resolution of their dispute. "Because arbitration is closer in time to the discriminatory conduct, the likelihood is greater that the employee will accept reinstatement rather than damages. In contrast, many courts are reluctant to order reinstatement following protracted litigation, by which time animus between employer and employee has intensified and the trust required for a solid employment relationship is irretrievably lost." John W.R. Murray, *The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims*, 26 Fordham Urb. L.J. 281, 298 (1999)(*citing* Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 Employee Rts. & Employment Pol'y J. 221, 245-55 (1997)).

[8] The data was compiled from a search of the Inter-University Consortium for Political and Social Research Database (July 11, 1997).

arbitration, compared to those set forth in the Federal Rules of Civil Procedure. In *Gilmer*, however, this Court emphasized that agreements to arbitrate are desirable *precisely because* they trade the intricate procedures of the federal courts for the "simplicity, informality and expedition of arbitration."[9] *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

To the charge that arbitration is more susceptible to bias and partiality than the court system, this Court responded in *Gilmer* that judicial review under the FAA would allow the courts to set aside any award in which there "was evident partiality or corruption in the arbitrators." *Gilmer*, 500 U.S. at 30-31 (quoting 9 U.S.C. § 10(b)). Moreover, recent efforts by arbitration providers to improve the diversity and expertise of the available pool of arbitrators have proven successful. *See, e.g.*, ABA Protocols, *supra* n.6 (calling for a racially diverse and knowledgeable pool of arbitrators); Nat. Rules for Resol. of Employment Disp. (AAA, effective June 1, 1996) (providing that only arbitrators with experience in employment law be appointed); JAMS/Endispute Rules and

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[9] *Gilmer* was decided before the American Bar Association ("ABA") Task Force on Alternative Dispute Resolution in Employment issued its Due Process Protocols for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Protocols"). (AAA website, available at www.adr.org.). The Protocol, which has been endorsed by many of the foremost providers of alternate dispute resolution ("ADR") services, calls for enhanced discovery in arbitration. Many such providers have implemented or expanded their discovery procedures in response to the Protocols.

Procs. for Mediation/Arb. of Employment Disp. (1995) (same). A related criticism often leveled at arbitration is the relative lack of thorough judicial review of arbitration decisions. Since this Court's decision in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), the standard of review for an arbitrator's award has been "manifest disregard of the law." While this is indeed a high standard, most employment disputes are fact-based and not likely to raise the kind of legal issues that would require thorough judicial review. *See Cole*, 105 F.3d at 1487. Nonetheless, "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.* at 1487 (quoting *Gilmer*, 500 U.S. at 32 n.4.)

Critics of arbitration sometimes point to the so-called "repeat-player" problem. They argue that, because the employer is always a party to an arbitration proceeding, it has an advantage over the one-time employee claimant in somehow manipulating the arbitration process. That the repeat-player theory was initially developed in the context of a perceived problem in traditional litigation, not arbitration, is often overlooked. *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974). Moreover, as arbitration providers have enhanced the procedural and due process rights of the parties, and have bolstered the ranks of arbitrators with increasingly competent and knowledgeable decision-makers, many of the perceived inequities have abated. Furthermore, as experienced employee advocates have themselves taken on some of the characteristics of repeat players, the playing field has been leveled substantially. Having repeatedly "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be

unable or unwilling to retain competent, conscientious and impartial arbitrators," *Gilmer*, 500 U.S. at 30; *Mitsubishi*, 473 U.S. at 634, there is certainly no basis for this Court to alter its course now.

IV. EXCLUDING EMPLOYMENT DISPUTES FROM MANDATORY ARBITRATION WOULD LEAD TO BIFURCATION OF PROCEEDINGS WITH THE POTENTIAL FOR CONFLICTING RESULTS OF SIMILAR DISPUTES

The policies favoring consistency of decision-making and integrity of the judicial process would also be served by reversal of the decision below. If this Court were to accept the position of the Ninth Circuit and hold that the FAA does not apply to contracts of employment and that any agreement to arbitrate between an employer and an employee constitutes such a contract, then all parties to employment disputes would suffer. Discrimination claims are frequently brought in connection with other employment claims, such as breach of contract, tort or wage and hour claims, all presumably subject to valid arbitration agreements under state law. Currently, all may be joined with statutory claims in arbitration, leading to judicial economy within a single forum. As all such claims may arise from the same facts, the consideration of these claims together preserves resources. If, however, this Court were to hold that the FAA does not apply to mandatory arbitration agreements between employers and employees, the resultant forum bifurcation would be wasteful to both parties. In particular, the party with the least resources -- typically the employee -- would be at a disadvantage. Furthermore, there would be a risk of conflicting decisions arising from the same

facts, causing injury to the integrity of both the courts and the arbitration system.

Not only could there be inconsistent findings of fact regarding the same employee, but there is a similar risk that issues common to several employees of the same large employer, situated in different states, would be subject to inconsistent procedures under state laws. In those states in which mandatory agreements to arbitrate statutory claims are enforceable, the employee will be compelled into the arbitral forum, while in other states, the parties may be forced into court. Arbitration agreements within the scope of the FAA are enforceable even if they conflict with state law policies that preclude arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *see also Great Western Mortgage Corp. v. Peacock*, 110 F.3d, 222, 230 (3d Cir. 1997). In jurisdictions other than the Ninth Circuit, agreements to arbitrate employment discrimination claims are enforceable even if state law requires the opposite. Provided there is a valid arbitration agreement, federal courts have jurisdiction to compel arbitration in those cases pursuant to the FAA. For example, in *Peacock*, the employee argued that New Jersey public policy, as expressed in the New Jersey Law Against Discrimination, was inconsistent with the mandatory arbitration of her sexual harassment claim. The court enforced the arbitration agreement in part because the "FAA preempts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Peacock*, 110 F.3d at 230, (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

However, if this Court upholds the Ninth Circuit's position, then the FAA would not apply to employment disputes, and there would be no federal jurisdiction to compel arbitration of such matters. Therefore, the arbitrability of claims would depend solely on whether employment discrimination claims fall within the scope of that particular state's arbitration laws. With regard to a national employer such as Circuit City, inconsistent treatment of similarly situated employees is inevitable, leading to an intolerable burden on employers with a nation-wide workforce, and to manifest unfairness in the treatment of employees.

It should not be forgotten in an examination of the FAA and statutory civil rights claims that there is a long history of regulation of the workplace at the state level. The state's concern for the well-being and fair treatment of its citizens has led to a welter of laws and regulations aimed at the speedy and balanced resolution of disputes between employers and employees. Most states have recognized that enforcement of these laws and regulations, as well as the obligations imposed on them in employment law by federal statute and administrative regulation, requires the encouragement of alternatives to the full process of trial. Arbitration and other forms of alternative dispute resolution are not only necessary to relieve an overloaded state court system, but also to provide for a fair, inexpensive and speedy resolution of employer/employee disputes.

CONCLUSION

For the foregoing reasons, the U.S. Chamber of Commerce respectfully requests that this Court reverse the Ninth Circuit in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (*per curiam*), and hold that the FAA does apply to contracts of employment, with the narrow exception of employees involved in or closely related to the actual movement of goods in interstate commerce. Prior decisions of this Court, the language and purpose of the legislation at issue, and the federal and state policies favoring arbitration and judicial economy, argue for such an outcome.

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In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE TEXAS EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Texas Employment Law Council ("TELC") is a voluntary, non-profit association organized to promote the common interests of employers and the general public in well-reasoned laws affecting private sector employer operations. TELC is incorporated under Texas law and is not affiliated with any other business association, except that its membership consists of employers doing business in Texas. Organized in 1984, TELC has approximately 35 members representing a diverse group of industries throughout Texas. These include, among others, refining and petrochemical, manufacturing, engineering and construction, insurance, financial services, communications, high-tech, forest products, and publishing. TELC's member companies range in size up to more than 50,000 domestic employees. Its governing body is a board of directors composed of professionals in the fields of human resources management and employment law. This combined experience gives the Council a depth of understanding of the practical and legal considerations relevant to the development of employment-related laws.

The majority of TELC's members are substantial-sized companies with large numbers of employees. As such, they are frequently required to defend against claims by current or former employees. Several TELC

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[1] The consent of all parties to the filing of this brief is on file with the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

members have developed employee dispute resolution programs that include agreements to submit claims that cannot be resolved informally to arbitration. These employers typically rely on the FAA when necessary to seek judicial enforcement of those agreements. A holding by this Court that the Federal Arbitration Act does not cover arbitration provisions in employment contracts would effectively abrogate these dispute resolution programs, which have become an evolving model in Texas (and the rest of the United States) for resolving common workplace disputes that otherwise drain inordinate resources from both the private economy and the judiciary. This, in turn, would increase the cost of doing business in Texas (and elsewhere) and limit employers' latitude to effectively and efficiently manage their operations and work forces. TELC urges this Court to reject the Ninth Circuit's view on this issue and find in favor of Petitioner. For these reasons, Texas Employment Law Council, as Amicus Curiae, respectfully submits this brief for consideration with regard to these important issues.

SUMMARY OF THE ARGUMENT

Founded upon its previous ruling in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*), the Ninth Circuit's decision in the instant case misconstrued the plain meaning of specific terms of the Federal Arbitration Act ("FAA" or "the Act"), attributed an implied meaning to such terms that conflicts with other provisions of the statute and with this Court's prior holdings, and, ultimately, frustrated the legislative intent to extend the scope of the FAA consistent with the most expansive

application of Congress' power to regulate commerce. In rejecting the plain meaning of the exclusionary language in section 1 of the Act, the Ninth Circuit relied instead on a legislative history that, in reality, offers virtually no guidance as to the specific purposes of such language. As a result, the court delivered an opinion that distorts the express language of the Act itself, conflicts with settled principles previously established by this Court, and frustrates the Act's primary purpose: the encouragement of alternate dispute mechanisms that benefit national commerce.

ARGUMENT

In *Circuit City Stores, Inc. v. Adams*, the Ninth Circuit erroneously concluded that the Federal Arbitration Act "does not apply to labor or employment contracts." 194 F.3d 1070, 1070 (9th Cir. 1999) (*per curiam*). The court reached this conclusion without independent analysis, instead relying on, and adopting, its earlier holding in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*). Accordingly, the following brief addresses the Ninth Circuit's holding in *Craft* and the reasons why that decision was incorrect.

A. The Ninth Circuit's Construction of "Transaction" In Section 2 Conflicts with the Language of the FAA As a Whole.

The Ninth Circuit's holding in *Craft* depends entirely on two underlying conclusions regarding the scope and intent of section 2 of the FAA. The first is that section 2,

on its face, appears not to encompass any kind of employment agreement because such arrangements do not fall within the dictionary definition – as of 1925 – of the term "transaction." The second is that the construction of section 2, insofar as it relates to coverage of the Act, is confined to the meaning of "involving [interstate] commerce" as of 1925. Both premises are faulty. The first rests on an overly restrictive reading of "transaction" which does not comport with its plain meaning. The second disregards this Court's controlling precedent.

Initially, the appeals court concluded that employment contracts did not fall within the definition of "transaction" – *i. e.*, "a business deal; an act involving buying and selling." 177 F.3d at 1085. This seems plainly wrong since employment relationships, at their essence, are contracts for the "buying and selling" of labor for the purpose of furthering some commercial enterprise. Thus, they must qualify as "business deals" or "transactions." This was as true in 1925 as it is today.

Additionally, the Ninth Circuit's premise – that "transaction" as used in section 2 did not include employment relationships – is inconsistent, ironically, with the same court's own insistence that, "[w]hen interpreting a statute, [a] court looks first to the words that Congress used . . . [and] rather than focusing just on the word or phrase at issue, . . . looks to the entire statute to determine Congressional intent." *Id.* at 1084-85, citing *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). In fact, had the court followed its own instruction, it would have reached the opposite conclusion regarding whether employment relationships can be "transactions"

under section 2. Specifically, in section 1, Congress expressly stated

> . . . but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. Clearly, this provision indicates that Congress understood that "transaction," as used in section 2 of the Act, could encompass an employment relationship. Otherwise, it had no reason to expressly exclude these, or any other, employment contracts from the application of the Act.[2] Stated another way, if Congress had not contemplated that the term "transaction" could encompass employment relationships, the exclusionary language in section 1 would have been unnecessary or superfluous. It is well settled that, if at all possible, a statute shall not be construed so as to render any of its provisions superfluous. *United States v. Alaska*, 521 U.S. 1, 59, 117 S.Ct. 1888, 1918 (1997). The *Craft* court's hypothesizing that "transaction" does not encompass employment relationships does precisely that, speculating that it was not

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[2] The argument might be raised that the "nothing herein" language refers to section 1 only, and indicates that Congress was in fact saying that no contracts of employment were to be considered "commerce" pursuant to the definition of that term earlier in section 1. Such a view would conflict with Congress' own characterization of the meaning of the exclusionary provision. When the Act was recodified in 1947, Congress clarified section 1 by adding its current caption: " 'Maritime transactions' and 'commerce' defined; *exceptions to operations of title.*" (emphasis added) Therefore, the exclusion cannot be read apart from the coverage provisions in section 2.

contemplated that section 2 might cover, as a "transaction," a particular kind of contractual relationship with regard to which, elsewhere in the statute, Congress was careful to carve specific and particular exceptions.

Thus, had the *Craft* court followed the fundamental rules of statutory construction which it articulated, it would have determined, in its threshold analysis of whether the Act encompasses written arbitration agreements in employment contracts involving commerce, that the most logical conclusion – based on section 1's express exclusion of certain varieties of such contracts – was that such contracts are covered. Having done so, it would then have turned its attention to section 1 to determine what, if any, limitations or restrictions Congress intended to place on the universe of otherwise-covered "transactions."

B. The *Craft* Court's Construction of "Involving Commerce" Conflicts with This Court's Previous Determination of Congressional Intent.

The *Craft* court also went to considerable lengths to conclude that the word "commerce," as employed by Congress in the 1920's, was extremely limited – applicable, essentially, only to the actual movement of goods or persons among the states. *Craft*, 177 F.3d at 1086. Consequently, the court reasoned, even if Congress had any inkling that an employment relationship could constitute a "transaction" under section 2, it intended that only those employment relationships involving the actual interstate movement of goods or persons would qualify as "transactions involving commerce." Thus, in *Craft's* view, the only employment contracts that might arguably be within Congress' power to regulate were those that it

expressly excluded, in section 1, from the scope of the Act. *Id.*

This narrow construction of "involving commerce" as used in section 2 has been implicitly rejected by this Court. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995), this Court held that use of the phrase "involving commerce" in section 2 signaled Congress' intention to extend the FAA's coverage to the fullest extent of its power to regulate interstate commerce. Consequently, contracts "involve" interstate commerce, under section 2, if they merely "affect" commerce – *i.e.*, such contracts are not limited only to those that encompass activities actually within the flow of commerce. *Allied-Bruce Terminix*, 513 U.S. at 273. Congress used the phrase "involving commerce" to indicate its intent not to limit "commerce" to whatever it was deemed to encompass at any particular time, but to allow the Act's coverage to expand as Congress' own power to regulate commerce might develop and expand. *Id.* at 275.

Indeed, if the FAA's legislative history casts light on any pertinent point, it is that Congress intended the Act to reflect its power over interstate commerce to its fullest extent. As Julius Henry Cohen, a prominent member of the American Bar Association and the general counsel for the New York Chamber of Commerce, informed the Subcommittee of the Joint Committee of the Judiciary in 1924:

> It is not only the actual and physical interstate shipment of goods which is subject to the interstate commerce powers of the Federal Government, but these powers govern every agency or act which bears so close a relationship to interstate commerce that they can reasonably be said

> to affect it. Contracts relating to commerce are within the regulatory powers of Congress.[3]

Jt. Hearings of the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st session (1924) 38.

The *Craft* court disposed of *Allied-Bruce Terminix* – and the reliance on it by other circuits that have construed the section 1 exclusion narrowly – by implying that this Court's construction of "involving commerce" did not impact the definition of "transaction." *Craft*, 177 F.3d at 1093. In other words, if employment agreements cannot be transactions under section 2, one need not embark on a construction of "involving commerce" that conflicts directly with this Court's ruling in *Terminix*. As discussed above, however, any ambiguity regarding whether "transaction" encompasses employment relationships is resolved by the Act itself, in its express exclusion in section 1 of only limited types of employment relationships. Thus, the Act covers written arbitration provisions in contracts "evidencing," or related to,[4] an employment relationship that affects commerce, subject to Congress' specific limitation of that universe of coverage in section 1.

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[3] Obviously, this statement by Cohen, presumably someone well versed in the contemporary understanding of "commerce" subject to regulation by Congress, undercuts the *Craft* court's hypothesis that "commerce" was limited *only* to the actual movement of goods or people across state lines.

[4] This Court clarified in *Allied-Bruce Terminix* that "evidencing" as employed in section 2 means, essentially, that the contract in question must be related to a transaction involving commerce. 513 U.S. at 279.

The *Craft* court's analysis also errs in that it freezes the scope and meaning of the FAA as of 1925. *Allied-Bruce Terminix* instructs that section 2 was intended to accommodate an expansive view of transactions "involving commerce," consistent with the fullest extent to which Congress' power to regulate interstate commerce might be construed. Consequently, the *Craft* court's focus on what might have been the scope of "commerce" in 1925, as a means of narrowing the scope of section 2, is misguided. As *Allied-Bruce Terminix* makes clear, section 2 is not static, but is tied to Congress' authority to regulate commerce. Thus, the breadth of section 2's coverage provision is restricted only by the narrow exclusion articulated in section 1 and not by the long outdated view of interstate commerce that existed in 1925.

C. The Meaning of the Section 1 Exclusion Is Discernible From the Plain Language of the Statute.

It was both unnecessary and erroneous for the *Craft* court to have embarked on a survey of the commonly held view of "commerce" in 1925, or an examination of the FAA's legislative history, in its inquiry as to whether the Act excludes from its coverage all contracts of employment. Rather, well settled rules of statutory construction provide sufficient guidance for interpretation of the exclusionary language in section 1.

First of all, it is presumed that the exclusionary language has some purpose that is not served equally well or better by another provision of the Act; that is, no statutory provision will be assumed to be superfluous or

merely redundant of another. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 115 S.Ct. 1061, 1069 (1995). Therefore, just as it would have been unnecessary to have expressly excluded certain kinds of employment contracts from the application of the statute if employment relationships in general were not "transactions," it would have been equally unnecessary to specify the particular kinds of employment contracts to which the Act is inapplicable if, in fact, *all* employment contracts were to be excluded. In other words, if Congress had intended to exclude all employment contracts from the scope of the FAA, it need only have said, "[N]othing herein shall apply to contracts of employment."

It did not, however. Instead, it qualified "contracts of employment" with the phrase, "of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The circuits that have addressed this issue, except for the Ninth, have correctly appreciated that the qualifying phrase must have both purpose and meaning, and that its purpose must be to limit the universe of "contracts of employment" falling within the exclusion from coverage. *See, e.g., Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("[i]t is quite impossible to apply a broad meaning to the term 'commerce' in section 1 and not rob the rest of the exclusionary clause of all significance") (internal citations omitted).

The meaning of the qualifying language is equally discernible. First, its literal wording reflects that it concerns only those employees who are "engaged in foreign or interstate commerce." In that respect, the language is at least as restrictive as the often-found words of art "in

commerce," which this Court has explained refers to "persons or activities within the flow of interstate commerce." *Allied-Bruce Terminix*, 513 U.S. at 273. Moreover, because the general category of "any other class of workers" follows the specifically listed "seamen" and "railroad employees," application of the principle of statutory construction known as *ejusdem generis* establishes that such "other class of workers" is limited to categories of employees whose work, like that of seamen and railroad employees, actually involves the movement of goods or persons in foreign or interstate commerce. *Norfolk & Western v. Am. Train Dispatchers*, 499 U.S. 117, 129, 111 S.Ct. 1156, 1163 (1991).

Thus, application of standard rules of statutory construction to the plain language of sections 1 and 2 leads inexorably to the conclusion that the FAA encompasses employment relationships that affect commerce, except for those limited categories of employees who are directly engaged in the movement of people or goods in interstate commerce.[5]

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[5] This is the conclusion of all the circuits that have addressed this issue, with the exception of the Ninth. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir. 1999); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

D. The "Legislative History" of the FAA Reveals Little (If Anything) of Congressional Intent Regarding the Section 1 Exclusion, and Provides No Basis for the *Craft* Court's Disregard of the Plain Language of the Statute.

Having disregarded the plain language of the statute, the Ninth Circuit compounded its error in *Craft* by attempting to glean the statute's purposes from its legislative history. It is difficult to imagine a more daunting, or less productive, enterprise. The legislation that would eventually become the FAA was originally introduced in Congress in 1922, as Senate Bill S. 4214 and identical House Bill H.R. 13522. On January 31, 1923, a ninety minute hearing was held before the Senate Subcommittee of the Committee on the Judiciary, which consisted of three senators. Appearing before the Subcommittee were three witnesses, one representing the New York Chamber of Commerce, the others both from the American Bar Association.[6]

The first witness did not address any issue related to whether employment contracts would be implicated in any way by the proposed legislation – nor did any of the Senators raise such an issue – concentrating much of his testimony on the excessive and rising costs of litigation to all businesses, and the beneficent effects an act enforcing arbitration agreements could be expected to have on such costs. *Report of the Subcmte of the Sen. Cmte. on the Judiciary*, 67th Cong., 4th Sess. 1-7 (1923). The second, W. H. H. Piatt of the ABA, spoke primarily of the legal and judicial procedural implications of the bill, and noted that the two

[6] The ABA had written the bill.

principal lines of argument against the bill had been the concerns that it would improperly usurp judicial prerogatives and that it would create a professional arbitrator class and take jobs from lawyers. *Id.* at 8.

During his presentation, however, Piatt brought to the subcommittee's attention an objection to the bill by the head of the seamen's union, who apparently had expressed concern that the bill would require members of his union to enter into, and abide by, contracts with arbitration provisions. *Id.* at 9. Piatt informed the subcommittee that it had not been the ABA's intention to craft an act "referring to labor disputes." He added, that if that was a concern, language could be added to the bill making it inapplicable "to seamen or any class of workers in interstate or foreign commerce." *Id.* at 9. Piatt's raising of the seamen's point, and his suggested method of circumventing their concern, evoked no comment from any member of the subcommittee. Instead, the discussion turned immediately to other issues, although a later reference was made by subcommittee chairman Sterling to Piatt's "suggested amendment in regard to the labor associations." *Report of the Subcmte of the Sen. Cmte. on the Judiciary*, 67th Cong., 4th Sess. 9-10 (1923).

The final witness did not address any issue related to employment contracts at all, and no Senator raised such issues. Included in the documentary materials submitted to the subcommittee was a letter from Secretary of Commerce Herbert Hoover who proposed that concerns such as the seamen's could be alleviated by addition of the exact exclusionary language that was ultimately included in Section 1. *Report of the Subcmte of the Sen. Cmte. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923).

The Sixty-Seventh Congress subsequently adjourned without taking any action on the arbitration bills. Neither the Senate nor the House Bill was reported out of committee, and there is no other recorded history concerning them. In the first session of the Sixty-Eighth Congress, however, in January 1924, the arbitration bills resurfaced as Senate Bill S. 1005 and House Bill H.R. 646. A Joint Committee of Subcommittees on the Judiciary began hearings on the bills on January 9, 1924. The bills included the language suggested by Secretary Hoover in his previous letter, and such language was neither changed thereafter nor discussed in any recorded hearing or debate regarding the bills. Indeed, the only mention of any issue regarding the inclusion or exclusion of contracts of employment was the resubmission of Secretary Hoover's letter with its suggested, and now incorporated, language for excluding contracts of employment of "seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Report of the Subcmte of the Jt. Cmte. on the Judiciary*, 68th Cong., 1st Sess. 12 (1924).

Thus, by the time the bill was passed by Congress and signed by the President, the question of its applicability to employment contracts had been raised on but one occasion, by the head of the seamen's union and on behalf of his constituency, whose concern was voiced, second-hand, by one of three witnesses before a three-senator subcommittee. There is no record of any of the three senators' views on this issue, or of the views of any of their ninety-three fellow senators, or of any of their counterparts in the House of Representatives. Similarly, in the next session of Congress, in which the FAA was

actually passed, there is no record of any member's view on this issue. To draw any conclusion about Congressional intent regarding employment contracts generally from this record would approach clairvoyance; to have done so in conflict with the plain language of sections 1 and 2, and via an analysis that conflicts with this Court's prior construction of "involving commerce," constituted substantial error.[7]

E. The FAA's Legislative History, and This Court's Opinion in *Allied-Bruce Terminix*, Establish That the Enforcement of Agreements to Arbitrate Employment Disputes Is Consistent With the Fundamental Objective of the Act: The Endorsement and Encouragement of Alternate Dispute Mechanisms Whose Efficiency and Economy Benefit National Commerce.

Although the FAA's legislative history provides no clear guidance as to Congressional intentions with respect to employment contracts – certainly nothing to warrant disregard of the plain language of sections 1 and 2 and this Court's conclusions as to Congress' intent to extend the Act's coverage to the limits of interstate commerce – such history does illuminate the fundamental

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[7] Indeed, one could reasonably infer from the political sensitivities at the time regarding transportation workers, such as seamen and railroad employees, that the exclusionary language added to § 1 was for the limited purpose of appeasing this narrow interest group, rather than for the purpose of excluding all employment agreements. *See Craft*, 177 F.3d at 1092.

objective of the Act, an objective consistent with its application to most employment situations. The sentiment supporting the enforcement of arbitration agreements originated from a consensus that American commerce would benefit surely and directly from the nurturing and encouragement of a prompt and cost efficient alternative to judicial litigation. Witnesses impressed this concern upon Congress, emphasizing that the bill would "eliminate friction, delay, and waste . . . [and] reduce the price of commodities to the consumer."

> If inexpensive but dependable arbitration were possible instead of costly, time-consuming, and troublesome litigation, the risk [of claims, fault-finding, and disputes] would be correspondingly smaller and the price [of commerce] made to conform therewith. . . .
>
> The merchants want this very badly. It adds to the cost to the consumer if the merchant has in the calculation of his prices to consider, in his overhead, possible litigation, possible claims. All of these expenses go into the overhead running expenses of the business. No matter how little it is, it will have the result of reducing the cost, without taking it out of the purchaser or anybody.

Report of the Subcmte of the Sen. Cmte. on the Judiciary, 67th Cong., 4th Sess. 3-7 (1923).

This Court, and others, have noted that the FAA was enacted as a response to the significant barriers, erected by state courts and legislatures, to the use of arbitration as an alternative means of dispute resolution. Through the FAA, Congress sought to protect the legitimate expectations of parties to contracts that their election to resolve

disputes through arbitration would be honored by the courts.[8] Thus, Congress provided, in section 2 of the Act, that arbitration agreements evidencing an interstate transaction are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Underlying Congress' desire that arbitration agreements be enforced was the fundamental premise that doing so would directly benefit the conduct and flow of interstate commerce. This is the Congressional objective implicitly acknowledged and furthered by this Court in *Allied-Bruce Terminix*, expressed in its conclusion that Congress intended the FAA to encompass "commerce" to the fullest extent of Congressional power to do so. Indeed, in recent years, businesses of all types have increasingly embraced the efficiency and economy of arbitration as a mechanism of dispute resolution in various contractual contexts. In so doing, such businesses rely on the FAA for the enforcement of arbitration agreements that have both the objective and the result of rationalizing and facilitating the conduct of interstate commerce, the same beneficent effects sought by the Act's creators.

Viewed as a continuum, the enactment of the FAA, this Court's endorsement in the "*Steelworkers* Trilogy" of arbitration as a legitimate and preferred method for

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[8] *Southland Corp. v. Keating*, 465 U.S. 1, 11-14, 104 S.Ct. 852 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801 (1967); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

resolving employment disputes in the context of represented work forces,[9] and, more recently, this Court's approval of arbitration of employment discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*,[10] have increasingly encouraged employers to rely on arbitration as a process for resolving the routine and recurring disputes that are the inevitable consequence of the employment relationship.

Thus, while the use of arbitration as a means of resolving employment disputes was not widespread when the FAA was passed, employers and employees have since embraced arbitration as a fair and efficient alternative to the traditional, but more expensive and time-consuming, judicial forum. In 1979, the Bureau of National Affairs determined that fewer than 1% of employers relied on arbitration for the resolution of

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[9] *See United Steelworkers of Am. v. American Mfg Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

[10] In *Gilmer*, 500 U.S. 20, 32-33, 111 S.Ct. 1647, 1654-55 (1991), this Court explicitly endorsed the use of arbitration in the context of employment discrimination claims. In so doing, this Court rejected the numerous challenges raised to the fitness of the arbitration process for resolving such claims. The Court found such attacks on arbitration "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30, 111 S.Ct. at 1654 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc. v. McMahon*, 490 U.S. 477, 481, 109 S.Ct. 1917, 1920 (1989)).

employment disputes. Bureau of National Affairs, Policies for Unorganized Employees (PPF Survey, No. 125, 1979). Fifteen years later, the General Accounting Office found that 10% of U.S. employers were using arbitration, and nearly that same percentage again was evaluating the potential benefits of doing so. U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employees Use Alternative Dispute Resolution* (1995) at 7. A follow-up survey by the GAO, two years later, found that 19% of employers surveyed had implemented some form of arbitration. U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* (August 1997) at 2.

The increased reliance on arbitration as a method of resolving employment related disputes has occurred simultaneously with the sharp rise in employment discrimination complaints in the 1990's. In the private sector, the number of discrimination complaints filed with the EEOC increased by 43 per cent between fiscal 1991 and 1994, a development that prompted many employers to seek alternative means of resolving employee disputes.[11] U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* (August 1997), p. 9. Such figures do not include the plethora of non-discriminatory wrongful discharge and employment tort claims in judicial litigation, which the

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[11] Twenty-five times more employment discrimination lawsuits were filed in 1998 than in 1970, an increase nearly double that of all other types of civil litigation combined. *New York State Bar Journal*, Vol. 71, No. 7 (September/October 1999), 20.

government has estimated are filed at the rate of approximately 10,000 per year and which, obviously, place additional strain on the efficient conduct of commerce. U.S. Department of Labor and Commerce, *Commission on the Future of Worker-Management Relations, Fact Finding Report* (May 1994) at 112-13.

The same need for consistency in the enforcement of arbitration agreements that led to Congress' passage of the FAA, and the advantages of arbitration, oft cited by this Court, such as its expediency, informality, and reduced cost,[12] are equally, if not more, applicable in the employment context as in that of any other contractual relationship.[13]

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[12] In 1994, the estimated average defense costs associated with judicial litigation of wrongful discharge claims was $124,000. *See* Lewis L. Maltby, *The Projected Impact of the Model Employment Termination Act*, 536 Annals of the American Academy of Political and Social Science, 107 (1994).

[13] Congress explicitly acknowledged the viability of arbitration to resolve employment claims, and implicitly endorsed a narrow construction of the section 1 exclusion, in the Civil Rights Act of 1991 and the Americans With Disabilities Act of 1990. Both statutes provide:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title.

Pub.L. 102-166, § 118, reprinted in notes to 42 U.S.C. § 1981; 42 U.S.C. § 12212.

While there is some disagreement about whether this provision was intended to authorize pre-dispute arbitration agreements, there is no dispute that, at a minimum, this provision signaled Congressional intent to encourage the use of

The increase in the number of employment disputes is no more than an inevitable consequence of the modern workplace. The percentage of the workforce covered by collective bargaining agreements continues to decline, leading to fewer and fewer employees whose employment is regulated by such agreements. In addition, the overwhelming majority of the fifty states adhere to the view that employment is at-will, a doctrine that permits an employer to discharge its employees for any lawful reason, even where the reason is arbitrary or unfair, thus producing frequent, but often groundless, litigation. In contrast to large commercial disputes where the cost of litigation, though high, is but a fraction of the amount in controversy, and where time involved in litigating the dispute may be immaterial given the significance of the outcome to the enterprise, employment disputes are commonly routine matters that reoccur with ratable frequency, involve litigation costs that oftentimes exceed any probable recovery by the employee, and may take longer to make their way through the court system than the employment relationship itself lasts.

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post-dispute agreements to arbitrate. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1194 (9th Cir. 1998) (construing this provision to encourage agreement to arbitrate after the dispute arises). Presumably, then, when Congress wrote these statutes, it did so with the belief that the FAA provided for the enforcement of arbitration agreements between an employer and employee, at least in some context. Otherwise, the parties would be left to the inconsistencies of the statutory and common law of the 50 states in seeking enforcement of such agreements. Yet, Ninth Circuit holdings in *Adams* and *Craft* are inconsistent with expressed Congressional desire to promote the use of arbitration in the employment arena.

It is this recognition of the benefits of arbitration in the employment context that led to the establishment of a body of federal substantive law designed specifically to ensure that courts would enforce arbitration agreements between employers and their unionized work forces. *See Warrior & Gulf Navigation Co.*, 363 U.S. at 581. Similarly, the use of arbitration to address employment disputes in the non-unionized sector equally fulfills the FAA's legislative goal of benefitting commerce by facilitating the expeditious resolution of disputes.

Increase in the use of arbitration to resolve employment claims has not come at the expense of the procedural or substantive rights of employees. Notwithstanding the strident attacks on the adequacy of arbitration in deciding employment disputes, the judiciary has been vigilant in ensuring that agreements to arbitrate between employers and employees are given no greater deference than any other contract. Thus, where arbitration agreements are substantively or procedurally unconscionable, or procured through overreaching, fraud, or duress, courts have, pursuant to section 2 of the FAA, refused to enforce such agreements.

The Eleventh Circuit's decision in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), typifies the gatekeeping function assumed by courts in evaluating the enforceability of arbitration agreements. In *Paladino*, the plaintiff signed an agreement that provided for the arbitration of all claims arising from his employment or termination of employment. *Id.* at 1056. The agreement further provided that the arbitrator could only

award breach of contract damages. *Id.* The court concluded that the agreement did not encompass the plaintiff's Title VII claim in light of the agreement's exclusion of damages that would be recoverable under Title VII. *Id.* at 1058. Courts have likewise found that other similar substantive limitations or restrictions on employees' rights, including the limitation or exclusion of damages and the abridgment of statutes of limitation, are unconscionable under traditional principles of contract law. *E.g., Graham Oil v. Arco Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir.1994); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025 (D.N.M.1996); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997).

Even where the arbitration agreement places no limitations on substantive rights and remedies, courts scrutinize the agreement to ensure that the employer has not imposed any procedural roadblocks that might, nonetheless, support a finding of unconscionability. The Fourth Circuit, for example, recently refused to uphold an arbitration contract that imposed rules for arbitration that were deemed one-sided and unfair. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939-40 (4th Cir. 1999). Notably, despite holding the agreement unenforceable, the Fourth Circuit emphasized its commitment to upholding the liberal federal policy in favor of arbitration. *Id.* at 941 (noting that "[t]o uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution").

Similarly, in *Cole v. Burns Int'l Securities Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), Judge Edwards, writing for the court, enforced an agreement to arbitrate between an

employee and his former employer but established certain "minimum standards" where the agreement to arbitrate was a condition of employment. These standards included the requirement of a neutral arbitrator with knowledge of the substantive area of law, the right to reasonable discovery, an affordable process, the right to counsel, and the right to a written opinion explaining the decision. *Id.* at 1482-83, 1485 & n.11. *See also, Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (refusing to enforce an agreement that required the plaintiff, a janitor, to pay one-half the costs of the arbitration proceeding); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459 (S.D.N.Y. 1997) (concluding that a clause in an arbitration agreement purporting to preclude an award of attorneys fees to a prevailing party was void as against public policy).

Finally, courts consistently rely on fundamental principles of contract law to ensure that the formation of the arbitration agreement does not violate basic prohibitions against the use of duress, coercion, and fraud. *See, e.g., In re Turner Bros. Trucking Co.*, 8 S.W.2d 370, 373 (Tex. App. – Texarkana 1999) (holding an arbitration agreement invalid where the employee who signed the agreement was functionally illiterate and the employer's representatives who presented the agreement did not explain to the employee what he was signing); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 981, 64 Cal. Rptr. 2d 843, *modified*, 16 Cal.4th 283 (1997) (holding that plaintiff's claim of fraudulent inducement was supported by evidence that Kaiser (the plaintiff's health plan) "misrepresented the speed of its arbitration program, a misrepresentation on which [the plaintiff's employer]

relied by selecting Kaiser's health plan for its employees. . . . ").[14]

Arbitration has matured since the enactment of the FAA. Today, employers and employees alike rely on the process as a mechanism for fairly and efficiently resolving work related claims. The arbitral forum provides a means for full vindication of statutory and common law rights balanced with the laudable goal of expediting dispute resolution while reducing its cost. Congress' objectives in passing the statute have been furthered by this evolutionary growth of arbitration as an alternative to lawsuits. Adoption of the restrictive construction of the FAA in *Craft* would effectively deprive employers and their employees of the significant benefits that have been gained through the widespread adoption of arbitration programs in the workplace. This, in turn, would defeat,

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[14] In addition to these judicial safeguards, the organizations most frequently called upon to administer the arbitration process have a heightened sensitivity to ensuring that employment claims are resolved in accordance with basic notions of due process. For example, in 1995, the Taskforce on Alternative Dispute Resolution in Employment, consisting of members from such groups as the American Arbitration Association, the Federal Mediation and Conciliation Services, the National Employment Lawyers Association, the National Academy of Arbitrators, and the Labor and Employment Law Section of the ABA, developed a protocol for use in the employment dispute setting calling for fundamental due process safeguards, fair and appropriate discovery, the right of representation by counsel, and the selection of a neutral arbitrator who is authorized to grant all remedies that would be available in court. Evan J. Spelfogel, A Focus on Fairness, Due Process, in ADR, *National Law Journal*, Aug. 9, 1999 at B10.

rather than promote, the objectives Congress had in mind when it enacted the FAA.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision in *Adams* should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

—v.—

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF REVERSAL

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF REVERSAL

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted by *amicus curiae,* the American Arbitration Association, Inc. ("AAA"), not in support of either party, but to urge reversal of the decision below.[1]

[1] As required by Rule 37.6, *amicus curiae*, the AAA states that this brief was authored on its behalf by the counsel identified on the cover and the signature page, and that no one other than the AAA and its counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae, the AAA, is a not-for-profit, public service organization founded in 1926, after Congress' enactment of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* Today, the AAA offers a broad range of dispute resolution services through offices located in 37 cities throughout the United States and cooperative agreements with arbitral institutions in 39 countries around the world. Millions of non-union U.S. workers currently are covered by mediation and arbitration agreements that call for administration by the AAA. In 1999 alone, the AAA administered more than 1900 employment-related mediations and arbitrations for employees other than those covered by collective bargaining agreements.

In addition to maintaining administrative procedures, rules and guides for private mediations and arbitrations, the AAA trains and maintains rosters of mediators and arbitrators; publishes arbitration awards; conducts educational programs; provides membership services; and maintains library and research facilities. In 1995, the AAA was instrumental in the promulgation of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Due Process Protocol") designed to provide fairness, equitable treatment and procedural regularity in the extra-judicial resolution of employment disputes.[2]

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[2] Signatories to the Due Process Protocol, in addition to the AAA, include designees from the National Academy of Arbitrators, the Labor and Employment Law Section of the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution and the National Employment Lawyers Association. These organizations represent

Since the AAA regularly is engaged in the administration of employment arbitration agreements, as well as the education and training of arbitrators and mediators in employment issues, the AAA has a substantial interest in the Court's resolution of the important question presented by the Petition: Whether the Ninth Circuit erred in holding that Section 1 of the Federal Arbitration Act does not apply to contracts of employment. Moreover, the AAA's substantial experience with the arbitration of employment claims makes it uniquely qualified to comment on the significance and practical consequences of the Ninth Circuit's decision below and to provide a perspective which the AAA hopes will assist the Court in its consideration of the merits of this action. With this singular focus in mind, the AAA respectfully files this brief as *amicus curiae* to stress the desirability of vacating the decision below.[3]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, contrary to this Court's rulings in support of employment arbitration and the holding of every other circuit on the issue, threatens to remove the uniform

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employment attorneys, representatives of labor and management and dispute resolution professionals.

[3] The AAA has filed *amicus curiae* briefs in numerous arbitration-related cases previously before the Court, including *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *UBC Southern Council of Industrial Workers, Local Union No. 2713 v. Bruce Hardwood Floors*, 522 U.S. 928 (1997); and *Green Tree Financial Corp.-Alabama v. Randolph*, No. 99-1235 (*cert. granted* Apr. 3, 2000).

application of the FAA from millions of employment relationships currently covered by arbitration agreements across the country.

This Court has long emphasized that the FAA establishes a "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Consistent with this policy, the Court has enforced agreements to arbitrate a wide variety of disputes, including, *inter alia*, statutory employment claims. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). As the Court has stressed, by arbitrating claims, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). *See also Gilmer*, 500 U.S. at 26, 31. Indeed, the AAA's National Rules for the Resolution of Employment Disputes ("Employment Rules") and the Due Process Protocol provide parties to an arbitration with explicit due process protections of their substantive rights, and preserve the right to assert a claim before the Equal Employment Opportunity Commission, the National Labor Relations Board, or any other government agency.

ARGUMENT

A WELL-ESTABLISHED NATIONAL SYSTEM FOR THE EFFECTIVE ARBITRATION OF EMPLOYMENT DISPUTES HAS DEVELOPED OVER THIS POST-*GILMER* DECADE

Nearly a decade ago, in the context of enforcing an agreement to arbitrate a statutory employment dispute, this Court emphasized that the FAA "reverse[d] the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and place[d] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

A. In Reliance Upon *Gilmer*, Over 500 Companies Have Developed National Employment Arbitration Programs Using The Due Process Protocol And The AAA

In the years before the *Gilmer* decision, the AAA administered arbitration agreements arising under collective bargaining agreements, hundreds of individually negotiated employment contracts and a small number of employer-promulgated programs.[4] In the years after *Gilmer*, over 500 companies have adopted multi-step Alternative

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[4] According to the AAA's records, one of the first company-wide employment ADR programs, which included arbitration for the resolution of employment disputes, was implemented in 1955. Employment arbitrations, including under individual contracts, were administered under the AAA's Commercial Arbitration Rules until adoption of the Due Process Protocol in 1995.

Dispute Resolution ("ADR") programs, with arbitration usually as the final step, naming the AAA as the organization responsible for the administrative process. These arbitration provisions cover an estimated five million individuals employed nationally in a wide range of jobs including clerical workers, sales personnel, first line supervisors, middle managers and top executives in virtually every industrial and service sector.[5]

B. Substantive Rights Are Protected When Employment Arbitrations Are Administered Under The Due Process Protocol

As the use of arbitration to resolve employment disputes increased after *Gilmer,* the AAA took the initiative to address concerns over the fairness to employees required to arbitrate statutory claims by developing special Employment Rules, incorporating the protections of the Due Process Protocol.[6] Adopted by the AAA in 1995, the Due Process Protocol requires that all participants in arbitration be accorded, *inter alia*, the right to a neutral third party decision-maker, the right to select the arbitrator from a diverse pool,[7] the right to counsel,

[5] As a comparison, in the unionized labor context, virtually all collective bargaining agreements provide for arbitration of unresolved grievances, covering an estimated 15 million employees. The AAA administers almost 15,000 labor arbitrations each year.

[6] The texts of the Employment Rules and the Due Process Protocol may be found on the AAA's website, www.adr.org, under "Focus Areas–Employment."

[7] In accordance with the Due Process Protocol, the AAA has developed a diverse national panel of 575 arbitrators and mediators, who participate in the AAA's mandatory training. These arbitrators were recommended by

the right to discovery as authorized by the arbitrator, the right to the same remedies as those available in court (including the right to an award of attorney's fees in conformity with law), and the right to a written opinion.[8]

To ensure that these substantive and procedural rights of the parties to an arbitration provision are not compromised, the AAA reviews employer-promulgated ADR programs for compliance with the Due Process Protocol; if the AAA determines that a dispute resolution program materially deviates from these due process standards, the AAA will decline to administer cases under that program.

C. The Post-*Gilmer* Experience With Employment Arbitration Has Prompted An Expansion Of Procedural Safeguards And Resolution Options

Although the genesis of the Due Process Protocol was to offer protection specifically for statutory employment claims encompassed by mandatory arbitration programs, the widespread adoption of employer promulgated plans conforming to the safeguards of the Due Process Protocol has had a much broader impact. Invariably, the safeguards of the

advisory committees composed of individuals from various constituencies including the American Civil Liberties Union and Equal Employment Opportunity Commission, members of the labor community, and plaintiff and management attorneys.

[8] Some critics of employment arbitration have expressed concern that the privacy of AAA-administered arbitration is undesirable because its decisions do not build a precedential body of law. In the fall of 2000, the AAA will be publishing employment arbitration awards, redacting the identity of parties, thus addressing this concern.

Due Process Protocol have been extended to *all* disputes arising out of the employment relationship, including non-statutory claims. In fact, only 770 of the 6200 employment cases filed with the AAA from 1997 through June 2000 (*i.e.*, about 12%) involved statutory issues, but all of them benefitted from the Due Process Protocol's protections.

The widespread acceptance of the Due Process Protocol has also expanded the type of remedial procedures available to workers, as employers who implement employment ADR programs typically offer a multi-step process before arbitration. These programs have made available to millions of workers a wider range of dispute resolution alternatives – from very informal processes such as peer review and open door policies, to progressively more structured or formal options such as ombudspersons, mediation, and binding arbitration.

In addition, company programs increasingly offer variations on mandatory pre-dispute arbitration, including some which allow the employee the discretion to determine whether to opt-in to arbitration after a dispute arises and others which compel a multi-step dispute resolution process, culminating in an arbitration the results of which are binding only on the company. The multi-step dispute resolution policies of Texaco and TRW, for example, require the company to abide by an arbitrator's decision if the employee accepts it, but permit the employee to pursue a lawsuit if dissatisfied with the arbitrator's award. Eaton Corporation's program compels the company to arbitrate disputes at the request of its employees.

Moreover, many employer-promulgated programs expand the definition of arbitrable disputes to encompass employee grievances that otherwise would not be cognizable in court. In

these programs, employees often are permitted to resolve other employment-related concerns through the ADR program (*e.g.*, those involving promotions, compensation, and company policies). Thus, although the original intent of the Due Process Protocol was only to provide protections for statutory claims, the vast majority of employment claims – and, certainly, all claims administered by the AAA – are administered in conformance with these due process requirements. And, of course, under the FAA a contract for arbitration that is overreacting is voidable under grounds "as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

D. The Availability Of Arbitration Has Prompted The Early Resolution Of Workplace Disputes

Contrary to predictions that widespread use of ADR agreements for employment disputes would result in a flood of arbitrations, actual experience has been far different. Due to the variety of options offered by most employers' in-house dispute resolution programs, the vast majority of disputes brought under dispute resolution programs are resolved before arbitration.[9] Moreover, a significant number of those disputes that actually proceed to filing for arbitration with the AAA settle before an arbitration award is issued. As previously indicated, approximately five million workers are covered by employment dispute resolution programs that provide for the AAA to administer the arbitration, often as the final step.

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[9] For example, Darden Restaurants recently reported that in 1999, 50,000 calls were made to the employee toll-free hotline, the first step in the company's multi-step procedure, which also includes peer review, mediation and arbitration. Only two cases have advanced to arbitration since the program was initiated in 1997. *Conference Report: Workplace Conflicts Examined at Bowie State*, ADR REPORT, June 21, 2000, at 4.

Despite the large number of individuals covered by these programs, in 1999, the AAA had approximately 1500 arbitrations filed, and half of those arbitrations resulted from individual employment contracts that contained a negotiated arbitration clause.

E. Employment Arbitration Is At Least As Effective For Employees As Litigation

The concern that arbitration is less favorable to employees than litigation similarly is unfounded. A recent article by the former director of the American Civil Liberties Union's *National Task Force on Civil Liberties in the Workplace* compared the results of AAA employment arbitration decisions with litigation results and concluded that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISP. RESOL. MAG., Fall 1999, at 23, 24. Arbitration also favors employees to the extent that, in arbitration, their claims are more likely to reach a hearing on the merits rather than be subject to dismissal on summary judgment in court. By comparison, research suggests that "[e]mployers win 98 percent of cases which are resolved through summary judgment." *Id.* at 24. As Mr. Maltby concluded, he "'would rather get a fair arbitration than a nonexistent jury trial'". Janet Novack, *Silver Lining*, FORBES, Nov. 21, 1994, at 124.

The process of arbitration itself also provides a variety of benefits over traditional litigation. It is widely accepted that arbitration produces a decision through a less costly and more expedient process than a court proceeding. As this Court has

recognized, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). These considerations apply with particular force to individuals who seek to assert their rights against corporate employers.

Arbitration also resolves disputes more quickly from filing to finality, particularly in comparison with the pursuit of statutory employment disputes through court or administrative proceedings. The Bureau of Justice Statistics recently reported that the average length of time from filing of civil rights complaints (including employment-related claims) to disposition in federal district courts in 1998 was 13.1 months, with a median of 10.9 months. *See* Marika F. X. Litras, *Bureau of Justice Statistics Report on Civil Rights Complaints Filed in U.S. District Courts*, 13 Daily Lab. Rep. (BNA) at E-5, E-15. And, although reduced from previous years, the Equal Employment Opportunity Commission's ("EEOC") processing time for resolving charges of discrimination was reported in 1999 to be 268 days. *See* Jenna Greene, *EEOC Whittling Away Backlog*, LEGAL TIMES, Oct. 4, 1999, at 20. By comparison, in 1999, the AAA's average time from filing to closing (*i.e.*, cases awarded, settled or withdrawn) was only 118 days, with a median of 105 days. In addition to reducing the time to resolution, arbitration also correspondingly reduces the strain of employment litigation on courts and agencies, which, as a practical matter, cannot offer employees an equally rapid resolution.

Moreover, realistically, arbitration may often provide the only avenue for redress for some employees who otherwise would be unable to obtain legal representation to pursue a claim in court. According to one study, due to the wide-spread requirements of plaintiffs' attorneys that a potential plaintiff pay a retainer and have minimum provable damages, "only one in 20 employment discrimination claimants can get a lawyer to pursue the case." William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 45. However, an employee who would not have been able to find (or afford) an attorney to pursue her claim in court often can utilize her company's ADR procedure, up to and including arbitration, with or without legal representation, and obtain a just resolution. Under some programs, the employer will pledge not to use an attorney if the employee does not. In addition, the relative informality of the arbitration process, as well as the absence of the application of strict rules of evidence, reduces the disadvantage to the employee of proceeding on a *pro se* basis. Furthermore, in cases in which legal representation is desirable, the programs of certain employers

may assist the employee in paying for the costs of such representation.[10]

The availability of arbitration over this post-*Gilmer* decade, coupled with the widespread use of the Due Process Protocol, has produced an effective national system for the resolution of all types of employment claims, including claims that would never be heard in litigation.

In sum, the FAA's 75-year-old policy of favoring arbitration has become embedded nationally in routine employment practice. The Ninth Circuit's interpretation of the FAA would require employers to attempt to enforce these arbitration programs under varying state laws, rather than under a single consistent national policy. Multi-state employers and their employees would then face vastly different results depending upon the state where the particular employee is employed. Alternatively, some companies might choose to abandon their ADR programs altogether. By contrast, the continued national enforcement of employment arbitrations under the FAA provides both a high degree of consistency and due process protection. This well-established existing system of workplace arbitration can be a fair, effective and efficient means of

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[10] For example, Philip Morris Management Corp.'s Dispute Resolution program provides assistance to employees in paying attorney fees as well as other expenses of pursuing their claims through arbitration and mediation. *See Forum: Employment Disputes and ADR*, THE METROPOLITAN CORPORATE COUNSEL, Nov. 1996, at 51. The Dispute Resolution Program of Brown & Root (now Halliburton's Kellogg-Brown & Root) similarly compensates employees for legal expenses; however, the company reports that, in two-thirds of the arbitrations which occurred in the first three years of the program, the employee elected to proceed without legal counsel. *See id.*

resolving a large number and broad range of employment disputes when due process is protected.

CONCLUSION

WHEREFORE, the AAA, as *amicus curiae,* respectfully urges the Court to reverse the decision of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and LPA, Inc. respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of Petitioner Circuit City Stores, Inc. before this Court.

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 340 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA is a public policy advocacy organization representing corporate executives interested in human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion of current situations and emerging trends in labor and employment policy. LPA members are typically companies with business operations in the United States that have more than $750 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans, more than 12 percent of the private sector work force.

All of EEAC's and LPA's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C § 621 *et seq.*, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, and other equal employment statutes and regulations. Many of these companies have con-

tracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship, including statutory claims of discrimination. Other member companies are considering arbitration as an alternative to resolving employee disputes in the courts although they have not yet implemented an arbitration program. For these reasons, EEAC's and LPA's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes.

Thus, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC and LPA represent. For many years, the Federal Arbitration Act (FAA) has been the enforcement mechanism for arbitration agreements of many kinds, including those providing for arbitration of employment disputes. Contrary to every other circuit court of appeals, the Ninth Circuit below ruled that arbitration agreements found in employment contracts are not enforceable under the FAA. This Court's decision in this case will have a substantial impact on the future enforceability of agreements to arbitrate employment claims. EEAC and LPA thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of their significant experience in these matters, EEAC and LPA are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Circuit City Stores, Inc. (Circuit City) requires its applicants and employees to agree to take their disputes against the company to mutually binding arbitration. Pet. App. 2a. Towards that end, applicants for employment must sign the "Circuit City Dispute Resolution Agreement" ("DRA"). *Id.* Respondent Saint Clair Adams completed Circuit City's em-

ployment application, including the DRA, on October 23, 1995. *Id.*

At some time thereafter, Adams filed suit against Circuit City in state court in California. Pet. App. 6a. Circuit City petitioned the U.S. District Court for the Northern District of California to stay the state court action and compel arbitration. *Id.* The district court granted the petition. *Id.*

The U.S. Court of Appeals for the Ninth Circuit reversed. Pet. App. 4a. Relying on its prior decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999), in which it held the Federal Arbitration Act inapplicable to any labor or employment contract, the Ninth Circuit concluded that Adams' agreement with Circuit City was an employment contract to which the FAA did not apply. Circuit City petitioned this Court for a writ of *certiorari*, which was granted.

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, which makes agreements to arbitrate as enforceable as any other contract, includes within its scope those agreements contained in employment contracts, save for those involving employees who actually move goods in interstate commerce. 9 U.S.C. § 1. Every federal court of appeals but one has so interpreted the FAA, and this Court should reverse the erroneous decision of the Ninth Circuit.

Both this Court and Congress have endorsed arbitration as a means of resolving employment disputes, and in the final analysis, it is far superior to litigation. Not only is arbitration more efficient and less costly, but plaintiffs actually are more likely to succeed. Arbitration also stands a better chance of meeting the ultimate goal of preserving, rather than destroying, the employment relationship in which both parties have invested so much.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT IS APPLICABLE TO MOST EMPLOYMENT CONTRACTS

The Ninth Circuit below ruled incorrectly that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, is inapplicable to an arbitration agreement contained in a contract of employment.[2] Every other circuit court of appeals has ruled to the contrary.

Section 1 of the FAA, which defines "maritime transactions" and "commerce" for purposes of the FAA, states in pertinent part that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As explained in detail by the Third Circuit in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers*, 207 F.2d 450 (3d Cir. 1953), Congress' description of the types of workers excluded from FAA coverage is crucial. The statutory construction principle of *ejusdem generis* dictates that where general words in a statute follow specific words, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Norman J. Singer, Sutherland Stat. Const. § 47.17 (6th ed., 2000). Applying this principle, the Third Circuit reasoned that the specific identification of two groups of workers directly engaged in the transportation of goods in interstate commerce, "seamen" and "railroad employees," delimits the immediately following phrase "or any other class of workers engaged in foreign or interstate commerce" to workers who are likewise occupied in the movement of goods in commerce. Thus, the exception applies only to workers who are "actually

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[2] We assume, *arguendo*, that the agreement Adams signed is a "contract of employment" for purposes of § 1. If it is not, then the § 1 exclusion would be inapplicable to this case on that basis alone.

engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it," in other words, those in the transportation industry. *Tenney*, 207 F.2d. at 452.[3]

Since *Tenney*, every court of appeals has addressed the issue, and all but the Ninth Circuit have concluded that the § 1 limitation only excludes contracts of employment involving workers who actually move goods in commerce.[4] Given the clarity of the statutory language, there is no need to probe the legislative history in search of a contrary result. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977) ("[L]egislative history . . . is irrelevant to an unambiguous statute.").

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[3] Thus, this Court's footnote in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987), is not incompatible with the *Tenney* holding. Applying the FAA standard of reviewability to a labor arbitration award, this Court noted, "The Arbitration Act does not apply to 'contracts of employment of . . .workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases." The Court in *Misco* was not ruling on the scope of the FAA exclusion.

[4] *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Rojas v. TK Communications*, 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995); *Patterson v. Tenet Healthcare*, 113 F.3d 832 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Intl. Sec. Servs., Inc.* 105 F.3d 1465 (D.C. Cir. 1997).

II. ARBITRATION IS AN EFFECTIVE, INDEED PREFERABLE METHOD OF RESOLVING INDIVIDUAL EMPLOYMENT DISPUTES AND SHOULD BE PRESERVED BY THIS COURT

A. Both This Court and Congress Have Endorsed Arbitration as a Means of Resolving Employment Disputes

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court concluded that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, can be subject to compulsory arbitration.[5] In so doing, the Court reiterated its "'strong endorsement of the federal statutes favoring this method of resolving disputes.'" 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

Shortly after *Gilmer*, Congress too endorsed the use of arbitration to resolve employment discrimination claims. In plain language, the Civil Rights Act of 1991, Pub. L. 102-166, codified as 42 U.S.C. § 1981a, which made various amendments to most of the then-existing federal laws prohibiting discrimination in employment,[6] urges employers and employees alike to use out-of-court methods, including arbitration, to resolve disputes arising under each of these statutes:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including

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[5] Because the agreement to arbitrate was contained in a securities registration application, not a contract of employment, the Court "[left] for another day" the issue of the scope of the FAA § 1 exemption. 500 U.S. at 25 n.2. That day has arrived.

[6] 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*; and Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 - 12117.

> settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration, is encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added). The identical language appears in Section 513 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12212, which is applicable to all titles of the ADA.[7]

This is not surprising. Arbitration has long been the preferred method of resolving workplace disputes. Since this Court's holdings in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), and the *Steelworkers* Trilogy,[8] strong federal policy,

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[7] For this reason, the Ninth Circuit also erred in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998), holding that the Civil Rights Act of 1991 precludes mandatory, binding arbitration of statutory discrimination claims. To reach this conclusion, the Ninth Circuit reasoned creatively that mandatory arbitration was not "authorized by law" at the time the section was *drafted*, regardless of the fact that *Gilmer* had been decided by the time the law was *passed*. *Id.* at 1196. So far, the First, Second, Third, and Seventh Circuits have addressed the same issue and have flatly disagreed with the Ninth Circuit. *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 365 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999); *Rosenberg v. Merrill Lynch, Inc.*, 170 F.3d 1, 10-11 (1st Cir. 1999); *Desiderio v. National Ass'n of Sec. Dealers*, 191 F.3d 198, 203-04 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3497 (U.S. Jan. 31, 2000) (No. 99-1285).

[8] The first of the *Steelworkers* Trilogy was *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). In that case, the Supreme Court concluded that only by giving "full play" to the means chosen for settlement - arbitration - would the congressional policy in Section 203(d) of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act") be effectuated. *Id.* at 566. Therefore, the Court granted the union's petition to compel arbitration. Likewise, in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the union petitioned the Court to compel arbitration by the employer. The Court noted that the "present federal policy is

endorsed by both congressional and Supreme Court action, has favored resolving labor disputes by way of mandatory arbitration. *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). Since then, arbitration clauses contained within collective bargaining agreements have become commonplace. Moreover, mandatory arbitration is much more than a substitute for work stoppages and litigation. Professor Harry Shulman declared in 1955:

> To consider . . . arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both - but in the sense in which a transportation airplane is a substitute for a stagecoach. The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.

Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955). These words ring just as true today as they did forty-five years ago.

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to promote industrial stabilization through the collective bargaining agreement." *Id.* at 578 (footnote omitted). The Court then remarked that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Id.* (footnote omitted). In addition, the Court noted that mandatory arbitration clauses were enforceable pursuant to Section 301 of the LMRA. *Id.* at 582-83. Finally, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court narrowly construed its judicial review power of decisions made by arbitrators pursuant to collectively-bargained arbitration clauses. *Id.* at 596.

B. On Balance, Arbitration Is Superior To Litigation For Resolution of Employment Disputes

1. Arbitration Agreements Change Procedures, Not Substantive Rights

As the Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31. In so doing, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (quoted in *Gilmer*, 500 U.S. at 26). *Gilmer* put to rest any further contest over whether arbitration procedures are, as a general principle, adequate to resolve statutory claims; they are. 500 U.S. at 26. Rather, *Gilmer* properly left issues of "procedural inadequacies" to be resolved in individual cases. *Id.* at 33.

Towards this end, a multifactional task force of individuals designated by dispute resolution organizations, plaintiffs, management, labor and government, developed a "Due Process Protocol" designed to establish standards for the use of mediation and arbitration to resolve employment disputes. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Dispute Resolution Journal (Oct.-Dec. 1995) at 37, 39.[9]

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[9] Members of the Task Force and signatories to the Due Process Protocol were:

Co-Chairs: Christopher A. Barreca, Partner, Paul, Hastings, Janofsky & Walker, Rep., Council of Labor & Employment Section, American Bar Association; Max Zimny, General Counsel, International Ladies' Garment Workers' Union Association, Rep., Council of Labor & Employment Section, American Bar Association; Arnold Zack, President, National Academy of Arbitrators. Members: George H. Friedman, Senior Vice President, American Arbitration Association; Joseph Garrison, President, National Employment Lawyers Association; Michael F. Hoellering, General Counsel, American Arbitration Association; Charles F. Ipavec, Arbitrator, Neutral Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; Wilma Liebman, Special Assistant to the Director, Federal Mediation & Conciliation Service; Lewis Maltby, Director, Workplace Rights Project, American Civil Liberties Union; Robert D. Manning, Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Union Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; W. Bruce Newman, Rep., Society of Professionals in Dispute Resolution; Carl E. VerBeek, Partner, Varnum Riddering Schmidt & Howlett, Management Co-Chair, Arbitration Committee of Labor & Employment Section, ABA.

Dispute Resolution Journal (Oct.-Dec. 1995) at 39.

True to this Court's direction, the lower courts reviewing such claims have not been reticent about refusing to compel arbitration under rules they viewed as lopsided. *E.g., Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (finding that the employer that was responsible for setting the terms of the arbitration contract that covered employment-related claims, had breached its duty of good faith by creating contract terms so unreasonable that a fair resolution of claims by a neutral decisionmaker was impossible).

Likewise, courts have enforced arbitration agreements but reformed their terms if they viewed the procedures as too burdensome on the employee. *E.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (granting motion to compel but requiring employer to pay the costs of arbitration). Closely related are cases in which a court refuses to enforce an arbitration agreement because the employee did not have adequate notice of its terms. *Rosenberg v. Merrill Lynch, Inc.*, 170 F.3d 1 (1st Cir. 1999) (refusing to enforce a mandatory, predispute arbitration agreement contained in the securities industry registration form U-4 because the employer had not provided a copy of the rules that required the employee specifically to arbitrate employment discrimination disputes).

2. Procedurally Fair Arbitration Programs Offer Significant Benefits Over Litigation

Employment arbitration programs that are scrupulously fair are of substantial benefit to employees. As discussed below, avoiding the time, expense and stress of litigation can be advantageous for employees as well as employers.

One of the first comprehensive in-house corporate programs for resolving employment disputes is that developed and implemented by Brown & Root, a Houston-based company employing between 25,000 and 30,000 employees. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997) at 102.[10] After spending almost $450,000 to defend successfully a sexual harassment and tort claim case in 1992, Brown & Root decided that there had to be a better way, and "began a concerted effort to examine alternatives to the litigation system for resolving employment matters." William L. Bedman, *From Litigation to ADR: Brown & Root's Experience*, Dispute Resolution Journal (Oct.-Dec. 1995) at 8. As the company's in-house labor counsel explained, tort-type litigation "as a system of employment dispute resolution, is highly inefficient, both economically and morally." *Id.* at 11. Not only was litigation extremely expensive for both employer and employee, but it irreversibly damaged employment relationships. *Id.*

In designing its process, Brown & Root interviewed approximately 300 employees from all over the company, both individually and in "focus groups," to obtain their views on the company's current approach to workplace conflict and their reactions to various alternative methods. *Id.* at 9. From this, the company developed a four-step program that encourages early

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[10] Brown & Root is a subsidiary of Halliburton, Inc. *See* www.halliburton.com/corp/whoweare/about_halhistory4.asp

resolution by agreement, with arbitration as a last resort. Bales at 104-05. The company will not send a lawyer to the arbitration if the employee is unrepresented by counsel. Bales at 109. If the employee does have an attorney, the company will reimburse an employee up to $2,500 per year for ninety percent of his or her legal expenses for preparing and presenting the employee's case at arbitration. *Id.*

During its first two years in existence, nearly 1,000 employees used the program, which led to a resolution of over 75% of the cases in the first eight weeks following the employee's first contact with the program. Bedman at 13. Only about 15 cases went to arbitration, where the company's "win/loss record" was comparable to its prior record in litigation of such cases. *Id.* Subsequent data reflect that the company's percentage of wins actually has declined slightly. Bales at 112.

At the same time, the company reports substantial savings, not just in litigation costs, but in "human capital", given the number of relationships with employees that the program has preserved. *Id.* at 113. Employees who have used the Brown & Root program also have reported that they were satisfied by its procedures. *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, United States General Accounting Office, GAO/GGD-97-157 (Aug. 1997) at 40.

As a result, Brown & Root's process has been described by one commentator as "a *model* dispute resolution system." Bales at 113 (emphasis added). The success of Brown & Root's program has made it "one of the most admired and studied ADR programs." Michael Barrier, *A Working Alternative for Settling Disputes*, Nation's Business (July 1998), *available in* LEXIS, NEWS Library, NATBUS File, at *2. In the years since *Gilmer*, countless other employers have developed ADR programs using Brown & Root's system as a guide.

Brown & Root's experience demonstrates graphically why employment disputes should not be resolved in the same way as

a car crash. Unlike two automobile drivers who collide, employers and employees both have a strong interest in preserving a positive relationship with each other. Employers invest substantial funds, as well as the time and effort of a variety of personnel, in training each employee to do the best possible job. Simultaneously, employees invest their time, their effort, and considerable emotional capital in learning their craft and developing their careers. All of this can be destroyed irretrievably by the acrimony and scorched earth tactics of drawn-out litigation.

What do employers get out of litigation? Even a victory in court can cost hundreds of thousands of dollars. One survey showed that the average cost to an employer of litigating a seriously contested employment discrimination case is $130,000. Jacqueline R. DeSouza, *Alternative Dispute Resolution: Methods to Address Workplace Conflicts in Health Services Organizations*, Journal of Healthcare Management (Sept. 1, 1998), *available in* LEXIS, NEWS Library, ASAPII File, at *2. Yet the sum total of their victory is that they have successfully defended against a claim that might have cost more. They still experience a net loss, taking into consideration not only the money spent for legal fees, and the productivity cost stemming from the time commitment of employees involved in the case as witnesses, but the loss of their substantial investment in the plaintiff as an employee.

What do employees get out of litigation? Far less than even a 50/50 chance of a favorable verdict. Plaintiffs in federal employment litigation win in only about 40 percent of jury trials.[11] And only a tiny fraction of cases even reach a jury. "Employers win 98 percent of cases which are resolved through summary judgment." Lewis Maltby, *Employment Arbitration: Is It*

[11] Source: Database of Federal Trial Statistics, http://teddy.law.cornell.edu:8090/questtr7997.htm (results of trials from 1985-1997).

Really Second Class Justice?, Dispute Resolution Magazine (Fall 1999) at 23, 24.[12]

Despite these odds, a prospective plaintiff in an employment-related lawsuit still has to anticipate fees and expenses as a cost of pursuing litigation. The federal statutes prohibiting employment discrimination provide an award of attorney's fees only for the *prevailing* plaintiff,[13] and few plaintiffs prevail. As a result, employment discrimination plaintiffs must either pay their litigation expenses out of pocket or find an attorney willing to take the case on a contingent fee basis, which may be difficult given the limited chance of success. For many individuals, the costs involved in litigation may be prohibitive.

Employees are more likely to get their "day in court" in arbitration than they are in the judicial system. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997). Moreover, they are also more likely to get an explanation of the outcome in arbitration, since most employer-sponsored arbitra-

[12] The EEOC finds "no reasonable cause" in 59.5 percent of the charges filed with it. Equal Employment Opportunity Commission, Enforcement Statistics, Fiscal Year 1999. This strongly suggests that the agency may be the recipient of a fair number of gripes that, while legitimate, do not represent unlawful conduct, and that the charges are filed by employees who have no other choice but to characterize their grievance as discrimination. Through the use of ADR processes, sensible employers are providing these employees with an outlet for their concerns.

[13] *E.g.*, 42 U.S.C. § 2000e-5(k) (Title VII); 42 U.S.C. § 12117(a) (ADA) (incorporating 42 U.S.C. § 2000e-5 by reference). *See also* 29 U.S.C. § 626(b) (ADEA) (incorporating by reference 29 U.S.C. § 216(b) providing for a "reasonable attorney's fee" "in addition to any judgment awarded to the plaintiff").

tion programs, as well as the AAA Rules, require the arbitrator to produce a written opinion. Mei L. Bickner et al., *Developments in Employment Arbitration*, Dispute Resolution Journal (Jan. 1997) *available in* LEXIS, ADR Library, DRJNL File, at *16. A jury, of course, does not do so.

Not only are employees more likely to be heard in arbitration —but also, they are more likely to succeed. Employees are *more* successful in employment arbitration than they are in court. Partly because arbitration procedures typically do not provide for summary judgment, "far more employees win in arbitration than in court, and overall, employees who take their disputes to arbitration collect more than those who go to court." Maltby at 24. This fact is particularly significant given the limited grounds on which a reviewing court may vacate an arbitration award. 9 U.S.C. § 10.

Moreover, the speed with which disputes are resolved through arbitration far outpaces the judicial system. The federal courts take an average of 21 months to complete a civil case through jury trial, although ten percent of cases take more than 46 months. Table C-10[14], Administrative Office of United States Courts (Sept. 30, 1999). "An arbitration award usually is issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) *available in* LEXIS, 2NDARY Library, MSMITH File, at *3. The alacrity benefits both sides, but particularly employees, who can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Bales, *supra*, at 153-54.

[14] U.S. District Courts—Time Intervals From Filing to Trial of Civil Cases in Which Trials Were Completed, by District, During the 12-Month Period Ending September 30, 1999.

For the same reason, the liberal discovery offered under the Federal Rules of Civil Procedure is a two-edged sword for employees. Discovery in arbitration typically is somewhat limited in comparison. *Compare* Fed. R. Civ. P. 26-37 *with* Rule 7, *National Rules for the Resolution of Employment Disputes* ("AAA Rules") (American Arbitration Association, 1999) ("The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.") and Rule 13, *JAMS Arbitration Rules and Procedures for Employment Disputes* ("JAMS Rules") (2000) (providing for good faith, voluntary exchange of relevant documents, exhibits, and names of witnesses, and for one deposition as of right). While more exhaustive discovery arguably might expose hidden evidence the employee needs to support her claim, typically it is the employer who has an incentive to test the limits of the discovery process, perhaps merely for purposes of delay and creating additional expense, or even in a quest for after-acquired evidence to limit available remedies and drive down the potential damages award. *Cf. McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

Similarly, the more relaxed procedural and evidentiary rules used in arbitration cannot help but benefit the employee, at least one not represented by counsel. *E.g.*, Rule 24, AAA Rules ("conformity to legal rules of evidence shall not be necessary"); Rule 18(d), JAMS Rules ("The Arbitrator may be guided . . . by the Federal Rules of Evidence . . .; however, strict conformity to such rules of evidence is not required, except that the Arbitrator will apply the law relating to privileges and work product.").

Indeed, as some employment arbitration programs such as Brown & Root's have shown, the procedural rules can be simple enough that neither party needs or wants a lawyer.

As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted).

> Procedural rights, such as the right to trial by jury, extensive (and often excessive) discovery, and formal rules of procedure and evidence, mean little to employees who cannot find an attorney to take their case, and who, therefore, feel that the doors to justice are closed to them. Arbitration gives these employees a ready opportunity to have their claims heard.

Id. See also Commission on the Future of Worker-Management Relations, U.S. Dep't of Labor and U.S. Dep't of Commerce, Report and Recommendations (Dec. 1994) (also known as the "Dunlop Commission Report") at 30 (describing litigation as "a less-than-ideal method of resolving" statutory employment claims, due to long delays and costs).

"Over the years, there have been many things which everyone *knew* were true that turned out to be wrong. The idea that employees are better off in court than in arbitration may well be one of them." Maltby at 24. In a recent newsletter directed to its employer clients, a U.S. law firm said, "Try not to panic if an administrative complaint or lawsuit is filed. Just remember, litigation is simply the 'American way' of resolving disputes between employers and employees." Anna Elento-Sneed, Carlsmith Ball, *Here are suggestions for minimizing conflicts over workplace diversity*, Pacific Employment Law Letter (Oct. 1999), *available in* LEXIS, 2NDARY Library, MSMITH File, at *3-4. Some employers have found a better way.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and LPA, Inc. respectfully submit that the decision below should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 2000

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE*, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, IN SUPPORT OF THE PETITIONER

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INTEREST AND CONCERN OF THE AMICUS[1]

The Council for Employment Law Equity ("CELE") is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

The CELE includes in its membership Franklin Templeton Funds, Fujitsu America, General Electric, Halliburton, Masco, and Philip Morris, all of whom participated in this brief and all of whom have adopted successful Alternative Dispute Resolution ("ADR") programs with an arbitration component for resolution of employment disputes.

SUMMARY OF THE ARGUMENT

In reversing the U.S. District Court, the Ninth Circuit has adopted a unique and untenable interpretation of the Federal Arbitration Act's Section 1 exclusion.[2] This decision, if not reversed, will, for many employers, create havoc in employee relations, effectively dismantle their dispute resolution programs, and increase their litigation exponentially. Moreover, it will further strain our judicial system – and unnecessarily so.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Council for Employment Law Equity, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

[2] 9 U.S.C. § 1 (1994).

Alternative Dispute Resolution programs, with an arbitration component, represent a progressive and appropriate response to the explosive growth in litigation – especially employment litigation – in our country. ADR programs serve the interests of both employers and employees. In ADR programs, more complaints are raised and resolved, and they are resolved in a much more expeditious, civil, constructive, and cost-effective manner than complaints which are dealt with under our normal judicial system. Conflict avoidance and conflict resolution are the hallmarks of such ADR programs. Everyone wins – except the trial attorneys. Perhaps most importantly, workplace practices are corrected or altered so that small issues do not escalate into bigger issues, and co-workers are not subject to the same issues which first gave rise to the complaint.

For these and other reasons, workplace ADR programs – which most often include various levels of conflict resolution, including informal mediation, formal mediation, and/or arbitration – have become increasingly common and effective. Arbitration, already an integral part of employee relations in a union setting, is fast becoming a staple in the non-union private sector – *and* in the public sector.

A dangerous threat to this worthwhile employment practice stands in the form of the Ninth Circuit's *Circuit City Stores* decision,[3] an aberration on the legal landscape and an adventure in creative interpretation. If affirmed, the Ninth Circuit's decision would insert tremendous unpredictability and inconsistency into the workplace arbitration process, replace well-functioning federal procedures with a helter-skelter mosaic of state laws with legally questionable applicability, dissuade many employers from adopting or continuing ADR/arbitration

[3] 194 F.3d 1017 (9th Cir. 1999).

programs, and ultimately severely undermine a process by which many more employees have many more complaints addressed and resolved in a quick, fair, relatively painless, and highly effective way.

For numerous compelling legal and public policy reasons, the Ninth Circuit Court of Appeals decision in *Circuit City Stores* should be reversed, and employers and employees in the Ninth Circuit should have their rights and responsibilities restored, under the FAA, consistent with the rights and responsibilities of employers and employees in the 41 other states not in the Ninth Circuit.

ARGUMENT

I. Alternative Dispute Resolution Programs, With An Arbitration Component For Employment Disputes, Typically Have Substantial Procedural Safeguards To Protect The Rights Of Employees And All Parties.

A. The FAA Provides For Meaningful Judicial Review.

Many forms of ADR are either advisory or are processes by which the parties themselves arrive at a constructive solution to their problems. Some parties, who might otherwise use ADR, hesitate to submit their claims to binding ADR processes because they fear ADR will provide no legal redress to the party dissatisfied with the decision. While it is true that judges grant arbitration awards great deference,[4] such decisions are not immune from review.

[4] *See AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991), *cert. denied*, 502 U.S. 942 (1991).

Courts may refuse to enforce arbitration awards that were procured by fraud or undue means.[5] Section 16 of the FAA establishes the means for appellate review of arbitration awards,[6] while § 12 contains procedures for vacating, modifying, or correcting the award.[7] Therefore, the FAA itself contains the requisite procedural mechanisms for dispensing with unjust arbitration outcomes.

In addition, other avenues of review are available. For example, an employee has the option, for discrimination or harassment complaints, of petitioning the Equal Employment Opportunity Commission ("EEOC") to bring suit on his or her behalf at any time during the ADR process, including *after* the arbitration decision. Thus, the public policy role for the EEOC remains intact, and is recognized by employers and allowed for in ADR programs.

Common law also provides means of redress. A judicially created doctrine permitting vacatur exists for circumstances in which the arbitrator acts in manifest disregard of the law.[8]

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[5] *See* 9 U.S.C. § 10, which provides that an award may be vacated where the award was procured by corruption, fraud, or undue means; where the arbitrator was partial or corrupt, or where the arbitrators were guilty of misconduct; or where the arbitrators exceeded their powers or failed to execute a mutual, final, and definite award.

[6] 9 U.S.C. § 16.

[7] 9 U.S.C. § 12.

[8] *See Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999), *cert. denied,* 120 S. Ct. 1833 (2000), *citing First Options v. Kaplan*, 514 U.S. 938 (1995) (recognizing that arbitration awards may be set aside where they are in manifest disregard of the law).

Therefore, although arbitration awards are given significant deference, dissatisfied parties do have available significant alternatives to seek redress.

B. Most In-House ADR Programs Incorporate Substantial Procedural Safeguards.

In addition to the FAA's statutory safeguards, employees are afforded substantial *additional* procedural protections and benefits by most ADR programs themselves. ADR programs typically are designed with the intention of promoting satisfactory conflict resolution for all parties involved, and quite obviously work best when all parties "buy in" to the concept and practice. The credibility of an ADR program resides exclusively on its balance, safeguards, and fairness – and the more credible a program, the more likely it is to be utilized.

Because dispute resolution programs are not adversarial, employees are aided – both procedurally and financially – in the grievance process. For example, most corporate ADR programs are designed as a series of steps – including informal and formal mediation – leading up to arbitration. These programs address a *much* broader range of grievances than would be addressed by legal causes of action, and therefore provide employees with redress for complaints which would otherwise remain unresolved. Such inclusive grievance procedures usually begin with informal meetings or discussion, enabling a number of disputes to be resolved immediately. However, if the problem persists, in-house ombudsmen often attempt conciliation prior to outside mediation and/or arbitration. If the grievance does advance to arbitration, many ADR programs pay – or at least subsidize – the employee's legal fees.

For example, Halliburton, a leading international energy services firm, has implemented a highly successful, and widely imitated, Dispute Resolution Program ("DRP"). Halliburton's DRP is a four-option program providing multiple processes – both inside and outside the Company – for resolving employee complaints. The DRP encourages collaborative approaches to dispute resolution by offering multiple channels for direct talk, or negotiation, and for both informal and formal mediation. Most disputes are resolved within a month through the in-house options.[9] To ensure its independence, the DRP reports to a Dispute Resolution Policy Committee composed of senior executives, rather than to a department or a single individual, and has been submitted to repeated outside independent audits.

Halliburton's DRP, like other ADR programs, recognizes that an employee complaint may involve a statutory right. Therefore, the Company allows an employee to consult with a lawyer or other advisor at any time during the ADR process, and pays the participating employee's legal fees up to $2,500 per year. If the employee opts not to use an attorney during arbitration, the Company will participate without one as well.

Another example of a highly successful and respected ADR program is the program implemented by Philip Morris. Like Halliburton's DRP, the Philip Morris ADR program incorporates a series of procedural steps, beginning with an Open Door Policy ("ODP") and proceeding to outside arbitration. The ODP is a preventative policy whereby employees are encouraged to voluntarily discuss their grievances with immediate

[9] William L. Bedman, *Alternative Dispute Resolution*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR, ch. 7 (1997).

supervisors or high level managers without fear of retaliation. If this step fails to resolve an issue, a Human Resources representative serves as a neutral facilitator between the conflicting parties.

If the employee requests the third and fourth steps of the program – mediation and arbitration – the employee pays a $250 filing fee, which is waived if the employer is the one to request either procedure. Philip Morris pays all other administrative and processing fees. The Philip Morris Dispute Resolution Benefits Plan ("DRBP") enables employees to consult with attorneys of their choice, and, upon approval, pays 80 percent of the employee's legal fees up to $1,000, and/or the mediator's fees up to $2,500, for a combined maximum of $3,500 per employee per dispute.[10] The employee also participates in choosing the third-party, neutral arbitrators to preside over their dispute.

Other common features of ADR programs include the use of peer review panels, toll-free assistance hotlines, certified mediators and arbitrators, access to the same remedies available in court proceedings, and the use of formal – and equal – discovery procedures.

Because ADR programs are overwhelmingly successful and increasingly popular, withdrawing such innovative grievance resolution systems from the FAA's coverage would severely jeopardize such innovative polices and programs.

[10] Eric A. Taussig, *Predispute Arbitration Agreement: The Philip Morris Program*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR, ch. 8 (1997).

II. Our Well-Established National Labor Policy Strongly Supports The Use Of Arbitration Agreements In Employee Relations.

It is clear that Congress's intent in enacting the FAA was to encourage the use of arbitration.[11] Since its enactment in 1925,[12] and codification in 1947,[13] the use of arbitration in the private and public sectors has flourished.

A number of recent legislative and executive branch initiatives have reaffirmed our nation's commitment to, and acceptance of, ADR. Such measures include the Civil Rights Act of 1991 ("CRA"),[14] in which Congress specifically endorsed the arbitration of Title VII[15] cases. Section 118 of the CRA provides that "where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including… arbitration, is encouraged to resolve disputes arising under [Title VII]."[16] Not long before, Congress had adopted virtually identical language in the Americans With Disabilities Act ("ADA").[17]

Additionally, the Administrative Dispute Resolution Act ("ADRA") – passed in 1990 and subsequently amended and permanently reauthorized in 1996, and amended again in 1998 – mandates that federal agencies create internal ADR programs. The 1998 amended

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[11] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[the FAA's] purpose was to reverse the long-standing judicial hostility to arbitration agreements… and to place arbitration agreements upon the same footing as other contracts."

[12] 43 Stat. 883.

[13] *Supra* note 2.

[14] Pub. L. No. 102-166.

[15] 42 U.S.C. §§ 2000e *et seq.*

[16] 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. § 1981.

[17] 42 U.S.C. § 12212.

ADRA[18] requires each U.S. District Court to adopt local rules regarding the use of ADR. The ADRA's Findings and Declaration of Policy notes that:

> Alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.[19]

Additionally, many government agencies have implemented ADR programs governing their own employees. The United States Department of Agriculture's ADR program, for example, has an overall resolution rate of 82 percent, and the time from request for ADR to actual mediation averages 24 days.[20] The Federal Election Commission resolved all 26 employee complaints brought to the agency's Equal Employment Opportunity director in a recent three-year period.[21] Other government agencies to benefit from ADR programs include the Department of Labor, Department of Treasury, United States Mint, Army Corps of Engineers, Navy, Air Force, Postal Service, Department of State, and Department of Veterans Affairs.

That the federal government is so widely committed to the use of ADR for its own employees emphatically underscores the appropriateness of ADR use in private-sector employment.

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[18] Pub. L. No. 105-315.

[19] Pub. L. No. 105-315, § 2(1).

[20] John Ford, *Workplace ADR: Facts and Figures from the Federal Sector*, published at http://www.conflict-resolution.net/articles/Ford3.cfm.

[21] *Id.*

III. To Uphold The Ninth Circuit's Decision Would Undermine And Disrupt An Employment Practice – A Multi-Step Alternative Dispute Resolution Program Culminating In Binding Arbitration – Which Is An Integral Part Of Employee Relations In The United States Today.

A. Arbitration Of Employment Disputes Is Increasingly Common And Well-Entrenched In The Workplace.

The FAA and interpretative case law clearly indicate the strong federal policy in favor of arbitration as an alternative to litigation to resolve legal disputes. Employers have wisely responded by implementing innovative Alternative Dispute Resolution programs that fairly and efficiently resolve disputes at, or proximate to, their inception.

The cost, speed, and efficiency of resolving disputes outside of the courtroom have inspired many organizations to implement these in-house ADR programs. According to the United States General Accounting Office ("GAO"), in 1995, approximately ten percent of employers were using arbitration for employment disputes, and 8.4 percent were considering establishing such a system.[22] In 1997, this number increased by almost 90 percent to 19 percent of employers.[23] In a survey of more than 530 corporations in the Fortune 1000, more than 23 percent of respondents reported that they use ADR for non-union employment

[22] U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution* 7 (1995).

[23] U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* 2 (1997).

dispute resolution.[24] Of those companies using ADR, approximately 80 percent have used mediation, and 19 percent have used arbitration, to handle matters including discrimination complaints.[25]

In recent years, more than 40 major corporations have implemented such programs.[26] These ADR programs are in place to address the needs of more than two million U.S. employees.[27] The American Arbitration Association ("AAA") alone has exercised jurisdiction over ADR programs for more than three million employees.[28] Thus, the use of ADR is firmly entrenched in our country's workplace culture.

[24] Lipsky, David and R. Seeber, *The Use of ADR in U.S. Corporations: Executive Summary* (1997). The survey was conducted by Price Waterhouse and Cornell University's PERC Institute on Conflict Resolution.

[25] Philip Zimmerman, *In-House Dispute Resolution Programs*, CPA JOURNAL (March 1998).

[26] Evan J. Spelfogel, *Pre-Dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, 71 NEW YORK STATE BAR JOURNAL No. 7, 22 (1999). (Among the major U.S. companies that have successfully implemented ADR programs are: American General, Bear Stearns, Bechtel, Chevron, Credit Suisse First Boston, DaimlerChrysler, Franklin Templeton Funds, Fujitsu America, General Electric, Halliburton, Hallmark, Hughes Electronics, International Paper, J.C. Penney, LensCrafters, Masco, McGraw Hill, Philip Morris, Polaroid, Rockwell International, Solomon Smith Barney, Shell Oil, Texaco, TRW, Ultramor Diamond Shamrock, and UPS.)

[27] *Id.*

[28] Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RIGHTS L. REV. 29, 31 (Fall 1998).

B. Arbitration, And Alternative Dispute Resolution Programs In General, Have Been Widely And Enthusiastically Embraced Not Only By Employers, But By Employees And Unions As Well.

Many employers implement in-house ADR programs hoping to reduce legal fees, decrease employee turnover, and improve employee relations.[29] In-house programs often enable the parties to voice their concerns and craft mutually agreeable solutions to their problems in a more constructive, less contentious, and more expeditious way, thus helping to preserve the employment relationship. Typically, jobs are saved, not lost. More employee complaints are addressed,[30] and they are addressed and resolved more expeditiously. Moreover, inappropriate practices are more likely to be corrected, and resolution can be reached prior to escalation to a level which would be more detrimental and/or disruptive to more parties.

For example, Halliburton credits the implementation of its in-house Dispute Resolution Program with saving its employment relationship with more than 300 employees.[31]

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[29] *See, e.g.*, John Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist*, NEGOTIATION J. at 151, 153 (April 1996).

[30] For example, the Halliburton Dispute Resolution Program, which covers more than 40,000 employees in the United States, has experienced a steady and significant increase in employee complaints filed since its inception in June 1993. The number of employee complaints addressed by the DRP has increased from 369 in 1994 (its first full year of operation) to 890 in 1999, and is projected to further increase to more than 1,000 this year. Moreover, the number of employee complaints processed by the DRP has more than doubled the number of formal employee complaints filed *prior* to the DRP's inception.

[31] *See supra* note 9 at 161.

Additionally, the cost of administering ADR programs is far outweighed by the litigation savings.[32] Therefore, both employers and employees derive substantial benefits from the implementation of effective ADR programs.

Employees significantly benefit from ADR. The Princeton Survey Research Associates found that 83 percent of American workers favor arbitration.[33] One reason is that not only are disputes resolved more quickly and cheaply, but often the "after dispute" employment relationship is preserved. ADR is often less contentious and more accessible than the court system – and thus the employment area is particularly suitable for ADR.

Some experts believe ADR benefits employees – especially those with modest financial resources – more than it benefits employers. Noting that employees often prefer swift, less expensive, private relief to participating in "test" cases, three former EEOC officials, including a former EEOC Vice Chairperson, concluded that, "[t]he reality is that a more informal, simpler, and less confrontational system like ADR will encourage more valid complaints of discrimination to come forward. For many individuals, ADR expands access to the legal system."[34] In fact, employers often find that more employee grievances are raised and addressed when ADR programs are available.[35]

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[32] U.S. General Accounting Office, Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997).

[33] *See* PRINCETON SURVEY RESEARCH ASSOCIATES, *Worker Representation and Participation Survey Focus Group Report*, Princeton, N.J. (April 1994).

[34] R. Gaull Silberman, Susan Murphy, and Susan Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1553, 1558 (1994).

[35] *See, e.g., supra* note 29.

Employees also benefit by agreeing to submit disputes to arbitration *before* conflict arises. Citing the findings of the Commission on Worker-Management Relations (the "Dunlop Commission"), University of Michigan Law School Professor Theodore J. St. Antoine suggests that employers are unlikely to agree to binding arbitration *after* a dispute is filed in court because, in most cases, the claim will go nowhere or the employer will prevail on summary judgment.[36] As a result, most employees' discrimination cases never reach a judicial hearing on the merits. "For employers, the desired trade-off [in consenting to pre-dispute arbitration] is the one big case against the many smaller ones."[37] Additionally, as discussed in § VI.C. of this brief, the delay and expense in pursuing employment-related claims through litigation often robs employees of a viable dispute resolution forum.

IV. If The FAA Is Not Applicable To Employment Arbitrations, A Highly Inconsistent And Contradictory Patchwork Of State Laws Will Apply.

A. Many State Arbitration Statutes Are Hostile – In Purpose And/Or Practice – To The Federal Arbitration Act.

State arbitration laws are, quite literally, "all over the map" – especially in regard to employment arbitrations. While many state statutes embrace the letter and spirit of the FAA,[38] many do not.[39]

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[36] Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 THOMAS M. COOLEY LAW REV. 1, 8, (1998).

[37] *Id.*

[38] *See, e.g.*, Colo. Rev. State. § 13-22-203; Del. Code Ann. tit. 10 § 5701; D.C. Code Ann. § 16-4301 (1981); 710 Ill. Comp. Stat. 5/1; Ind. Code. 34-4-2-1; Me. Rev. Stat. Ann. § 5927; Mass. Gen. Laws. Ann. ch. 150C § 1; Nev. Rev. Stat. § 38.035; Rev. Mont. Code Ann. § 27-5-113; N.D. Cent. Code § 32-29.2-01; 42 Pa. Code Stat. Ann. § 7302; S.D. Codified Laws. § 21-25A-1; Tenn. Code. Ann. § 29-5-307; Va. Code Ann. § 8.01-581.01; and Wyo. Stat. Ann. § 1-36-103.

[39] *See, e.g.*, Alaska Stat. § 09.43.010; Ariz. Rev. Stat. § 12-1517; Ark. Code Ann. § 16-108-201(b); Ga. Code Ann. § 9-9-2; Idaho Code § 7-901; Iowa Code § 679A; Kan. Stat. Ann. § 5-401; Md. Cts. & Jud. Pro. § 3-206; Mich. Comp. Laws Ann. § 600.5001(3); N.H. Rev. Stat. Ann. § 542:1; N.C. Gen. Stat. § 1-567.2; Okl. St. Ann. tit. 15 § 818; Ore. Rev. Stat. § 243.650 et. seq.; R.I. Cen. Laws § 10-3-2; S.C. Code Ann. § 15-48-10; Tex. Civ. Prac. § Rev. Code Ann. § 171.001; Wash. Rev. Code § 7.04.010; and Wis. Stat. Ann. § 788.01.

To the extent that states such as California, Georgia, Alabama, and Nebraska would be hostile to the enforcement of arbitration agreements, this would conflict with the clear national policy in favor of the use of arbitration and ADR, and contradict the Congressional intent of the FAA itself.

It was not – and is not – the intent of Congress for the states to frustrate the purposes of the Federal Arbitration Act, and/or to act at cross-purposes with the pro-arbitration policies this statute seeks to expand and enhance.

In the absence of FAA applicability – which would result if the Ninth Circuit were upheld – a substantial minority of states' current laws would prohibit the many active ADR programs which have been implemented in good faith, embraced by employers and employees alike, and effectively utilized to the benefit of all parties over a significant period of time.

B. Multi-State Employers Need Uniform Policies And Programs.

National companies want – indeed, need – *national* employment policies in critical areas, such as Alternative Dispute Resolution.

Inconsistency state-to-state in the application, enforcement, administration, and negotiation of such policies often would be impractical and infeasible. Issues regarding employees who split their work time between two or more states, or between headquarters and field site assignments, or who are frequently transferred would create havoc for employers with ADR programs. The national policies favoring mediation and arbitration would be undermined, many employers would be dissuaded from adopting or continuing ADR programs, and fewer arbitrations would directly translate into more litigation – and a corresponding increased strain on our backlogged and overburdened judicial system.

National employers with ADR programs make a major commitment in implementing such a program in training, administration, communication, and – perhaps most significantly – transitioning of their corporate cultures. To abandon such a commitment – and investment – or to chip away at it piecemeal for the various operations in states with laws hostile to arbitration, would be unnecessarily and inappropriately destructive of a worthwhile employment practice and harmonious employee relations.

Employers with ADR programs – and their employees – *need* consistency of law, uniformity of their policies and programs, and a centralization of such ADR functions as training and administration if such programs are to remain effective and cost-effective. The Ninth Circuit's decision, if upheld, would undermine these needs.

C. Our Arbitration Law, Like Our Pension And Labor-Management Relations Laws, Requires National Uniformity.

If the Ninth Circuit's decision in *Circuit City* is upheld, for one small but critical area of jurisprudence, legal chaos may ensue.

The Uniform Arbitration Act[40] has not been enacted "uniformly" in all jurisdictions – far from it. For example, there is a wide range of various public policy exceptions state-to-state, and state arbitration statutes are as varied as the colors of the rainbow.

Foremost among employer concerns, if the Ninth Circuit is upheld, would be the inconsistent – and somewhat unpredictable – determinations that would ensue without FAA regulation. Employers and employees would be routinely subjected to a bifurcation of proceedings – one in court, one in arbitration – necessitating some form of collateral estoppel.

For example, as discussed below,[41] if *Circuit City* is upheld, a company's arbitration program may only cover contractual claims, but not discrimination claims. A breach of contract claim would go before an arbitrator, while an age discrimination claim would go – *at the same time* – to court.

As a result, there would be increased friction within the legal system – arbitration, state court, federal court – a bifurcation of legal actions, and a premium on which claims are decided first.

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[40] The Uniform Arbitration Act has been adopted in varying forms in all 50 states, plus the District of Columbia.

[41] *See infra* § V of this brief.

What is possible – indeed likely – is a volley of legal maneuvers back-and-forth, duplicative procedures, and contradictory results. Moreover, the strain on the parties, their resources, and the legal system would be multiplied.

Some areas of law – quite obviously – are most appropriate for federal jurisdiction and federal preemption, and the consistency, predictability, and streamlining that comes with it. Arbitration, as recognized by Congress in enacting the Federal Arbitration Act, is one of them.

Like our pension and labor-management relations laws, which provide for national uniformity through ERISA[42] and §301 of LMRA,[43] preemption of anti-arbitration state laws by the FAA is both necessary and appropriate. Just as employers – and their employees – would be faced with a patchwork of inconsistent and contradictory state laws if the National Labor Relations Act did not preempt state labor-management relations laws, so too would employers and employees stand in such legal quicksand if our arbitration laws were "defederalized."

V. <u>If The Federal Arbitration Act Is Held To Be Inapplicable To Employment Arbitrations, State Arbitration Statutes May Be Inapplicable To Federal Claims</u>.

Should the Ninth Circuit be upheld in *Circuit City*, and thus the FAA be held inapplicable to employment arbitrations, a legal argument is likely to be repeatedly raised that state arbitration laws would *not* be applicable to federal employment claims, such as claims of employment discrimination under Title VII,[44] the Age Discrimination in

[42] 29 U.S.C. § 301 *et seq.*
[43] 29 U.S.C. §§ 141 *et seq.*
[44] 42 U.S.C. § 2000e-2.

Employment Act,[45] and the Americans with Disabilities Act.[46]

Although the pro-ADR, pro-arbitration community generally would prefer that such state laws *were* applicable – in the absence of FAA coverage – a legal argument could be, and undoubtedly *would* be made again and again in various forums and jurisdictions that state arbitration laws are inapplicable to employment claims under federal statutes.

The Federal Arbitration Act, as interpreted by the Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[47] creates a strong presumption of arbitrability. The Court found that there needs to be express language in a statute to override this federal presumption of arbitrability. If the Court – by affirming the Ninth Circuit's decision – takes away that federal presumption, it is not at all clear that the states would have the right to require arbitration of federal claims.

At the least, states' rights to do so would be legally challenged repeatedly. What would likely result is a decade of litigation to reestablish order in an area of law that currently – with FAA applicability endorsed by *every* Circuit Court of Appeals with jurisdiction *except* the Ninth Circuit – is well-established and widely embraced, and is functioning equitably and efficiently.

Thus, the cause of states' rights may well be disserved by upholding *Circuit City*. In the end game, the states may *not* have the option of exercising arbitration jurisdiction over federal causes of action, regardless of the substance of state statutes or the will of state legislatures and courts.

[45] 29 U.S.C. §§ 621 *et seq.*
[46] 42 U.S.C. §§ 12101 *et seq.*
[47] 500 U.S. 20 (1991).

The resulting tragedy would be that arbitration of employment claims would *not* be covered by either federal (FAA) or state arbitration laws, to the great disadvantage of those served by ADR and arbitration overall.

Left out in the cold would be the millions of employees who currently *could* – and sometimes do – have their issues addressed and resolved, but who would have no such recourse in the barren legal tundra of an arbitration-less workplace landscape. Only those with access to a plaintiffs' bar which is committed to high-yield, big-issue litigation would find representation. Most employees do not fit that plaintiff's profile, and most employee grievances do not warrant such legal action. Most *do* warrant the informal mediation, formal mediation, and/or arbitration that ADR programs provide. However, in the legal environment the Ninth Circuit endorses – no Federal Arbitration Act coverage of employment arbitrations – such ADR programs would be an endangered species.

VI. As A Matter Of Public Policy, The Promotion Of Arbitration Of Employment Disputes Is Both Necessary And Appropriate.

A. The Court System Is Backlogged Due To Employment Lawsuits, And Employment Law Cases Create An Unnecessary Strain On The Limited Resources Of The Judicial System.

Employer interest in Alternative Dispute Resolution has grown correspondingly with the volume of discrimination charges filed both in the federal courts and with the Equal Employment Opportunity Commission.

In FY 1999, the reported number of employment discrimination charges filed with the EEOC totaled

77,444.[48] Private employment suits also grew at an astronomical rate. In January of this year, the Bureau of Justice Statistics ("BJS") published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.[49] Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that have flooded the U.S. District Courts in this period.[50]

The torrent of employment-related lawsuits coupled with the delays in case processing evince a need for more effective case management. Arbitration is well-suited to meet this need.

The federal judiciary appears to agree. The Alternative Dispute Resolution Act of 1998,[51] which was signed into law in October 1999, has promoted the use of ADR in the federal court system. This law mandates U.S. District Courts to establish their own ADR programs and authorizes the use of at least one form of ADR. Additionally, Recommendation 39 of the *Long Range Plan for the Federal Courts*[52] encourages U.S. District Courts to "make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation."[53] Clearly, the intent of promoting ADR

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[48] EEOC Charge Statistics, as published and available at http://www.eeoc.gov/stats/charges.html.

[49] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98" (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[50] *Id.*

[51] Pub. L. No. 105-315.

[52] See *New Law Authorizes ADR in All District Court*, THE THIRD BRANCH, published and available at http://www.uscourts.gov/ttb/feb99ttb/newlaw.html.

[53] *Id.*

methods within the court system is to lighten the federal court docket. Removing the FAA's coverage of employment agreements to arbitrate employee claims would undoubtedly exacerbate an already clogged and overburdened court system.

B. Driving Workers To The Equal Employment Opportunity Commission And Private Attorneys Does Not And Will Not Decrease Employment Discrimination Or Better Protect Employees' Rights.

As previously discussed, the EEOC is constantly overwhelmed with employee complaints. Its limited resources, expanding backlog, and frequent staff turnover all impede productivity.[54]

Moreover, a majority of claims brought to the EEOC are never litigated. For instance, of the 97,846 charges resolved by the EEOC in FY 1999,[55] only 16,102 of these charges were deemed meritorious and/or resulted in outcomes favorable to the charging parties, including negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.[56] It should be noted that over a quarter of these "merit resolutions" – 4,837 – were in fact unsuccessful conciliations, whereby the EEOC closed the case after resolution attempts failed. Although considered "merit" resolutions by the EEOC because the agency finds evidence of discrimination in the charging party's claim, unsuccessful resolutions do not result in any monetary benefit to the charging party.

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[54] *See* Darryl Van Duch, *Paralysis for EEOC Feared*, NAT'L L.J., August 24, 1998, at 1, 21.
[55] *See* EEOC Charge Statistics, *supra* note 47.
[56] *Id.*

The EEOC found no reasonable cause to exist in 58,174 of these claims.[57] Another 23,570 claims were closed for administrative reasons, including the EEOC's failure to locate the charging party and the charging party's failure to respond to the EEOC's communications.

Even if a party's claim is deemed meritorious, the EEOC does not litigate all claims. In 1999, the EEOC filed 439 direct lawsuits against employers.[58] Nonetheless, despite the perceived legitimacy the EEOC brings to a federal employment case, plaintiffs prevail *much* less often with the EEOC on their side than they do in arbitration. One study found that the EEOC won only 24 percent of its employment cases, whereas individual employees in arbitration won 51 percent of *their* cases.[59] Therefore, availing oneself of the EEOC charge process not only takes considerable time – it also seldom results in a successful outcome for the employee who alleges discrimination.

Employees fare no better pursuing private suits. Although a common, unfounded concern among arbitration detractors is that the use of pre-dispute, binding arbitration agreements robs litigants of their "day in court" with a jury of their peers, the truth is that the overwhelming majority of cases are never tried and never reach a jury. In 1993, a total of 245,687 civil cases were concluded in U.S District Courts.[60] Only 1.8 percent, or 4,456, involved jury trials.

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[57] *Id.*
[58] EEOC Litigation Statistics, FY 1992 through FY 1999, published at http://www.eeoc.gov/stats/litigaiton.html.
[59] Gregory W. Baxter, *Arbitration or Litigation for Employment Civil Rights?* 2 INDIVIDUAL EMPLOYMENT RIGHTS 19 (1993-1994).
[60] *See* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 854 (Fall 1998), *citing* Admin. Off. U.S. Ct., Federal Judicial Caseload Statistics, March 31, 1997, tbl. C-4.

Additionally, employee-plaintiffs usually do *not* prevail in jury trials. In fact, "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court."[61] In 1994, employee-plaintiffs won only 44 percent of jury verdicts in employment civil rights cases.[62] Of the 3,419 employment discrimination cases brought in 1994 in which the federal courts made a definitive judgment, 60 percent were dispensed of by pre-trial motions. Employers were the victors in 98 percent of these decisions.[63] In contrast, a study of employment *arbitration* cases conducted by the American Arbitration Association in 1992 found that employees prevailed in 73 percent of the cases they filed, and 64 percent of all cases.[64]

In another survey conducted by AAA, employees won their arbitration cases 63 percent of the time from 1993-1995.[65] Federal court employee litigants, by comparison, won only 14.9 percent of their cases in 1994.[66]

C. Resolution Of Employment Disputes Is Achieved In A Faster, Cheaper, Less Intrusive, And More Confidential Way Through Arbitration Rather Than Litigation.

The cost of bringing a lawsuit has become prohibitive for many would-be employee-plaintiffs. This is due to both

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[61] Lewis Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, DISPUTE RESOLUTION MAGAZINE, 23-24 (Fall 1999).
[62] *Id.*
[63] *Id.*
[64] Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995).
[65] *Id.* at 210-213 (1997).
[66] Maltby, *supra* note 27 at 47.

the protracted nature of litigation, and the increase in attorneys' fees. Employee-plaintiffs frequently cannot afford plaintiffs' attorneys' hourly rates or retainers,[67] and a simple consultation fee alone can cost $300.[68] The cost of litigating employment suits is increasing at the rate of 15 to 20 percent annually.[69]

Although Title VII and other federal civil rights statutes include provisions for attorneys' fees,[70] the plaintiff must prevail to collect. Given the low plaintiff-employee win rates, plaintiffs' attorneys have diminished incentive to offer their services on a contingency basis. As a result, as many as 95 percent of employees who seek help from the private bar with an employment matter do not obtain counsel.[71]

The lifespan of an average employment case also has increased dramatically. According to the Federal Judicial Center, it takes almost two years (679.5 days) from the time an average case is filed in U.S. District Court until the date

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[67] Partner-level employment lawyers commonly charge hourly rates of $250-$350 or more. *See, e.g., Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. App. 1998) (approving $300).
[68] Maltby, *supra* note 27 at 58.
[69] *Id.* at 62, *citing* James Dertouzous et al., *The Legal and Economic Consequences of Wrongful Termination*, at viii (1988).
[70] *See, e.g.*, 42 U.S.C. § 1988(b) (1998).
[71] Paul Tobia, *Alternative Dispute Resolution: Testimony Before the Commission on the Future of Worker-Management Relations* (1994). (The vast majority of would-be plaintiffs do *not* become plaintiffs under our judicial system, while *every* employee gets his or her grievance addressed under ADR programs. The plaintiffs' bar generally has negligible interest in marginal claims, disadvantaged clients, and/or potentially low-yield outcomes.)

of resolution.[72] Other surveys have found this to be a conservative estimate, finding instead that the average civil case lasts from two-and-one-half years[73] to eight years,[74] depending on the jurisdiction and the nature of the case.

Additionally, the EEOC is slow. In fiscal year 1997, the EEOC reported that it takes the agency nearly two years, on average, to process an employee's charge of discrimination.[75] Thus, litigation is not a means of achieving swift justice. In contrast, the average time frame for resolving an employment-related arbitration case is 8.6 months.[76]

Another benefit to arbitration is that it preserves the parties' confidentiality in a way that litigation cannot. ADR proceedings are not formally recorded or filed. Therefore, participants have the opportunity to resolve their disputes without undue concern about their privacy. Moreover, ADR processes are insulated from public scrutiny, and awards and hearing proceedings generally are kept confidential. ADR also allows the parties to be more open with one another during the process, and therefore may be less intimidating than traditional litigation.

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[72] Maltby, *supra* note 27 at 56.

[73] B. Mahoney et al., Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings, Vol. 8 (1985).

[74] *Evaluating and Using Employer-Initiated Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ADLI-ABA Course of Study, Apr. 28-30) 875, 894 (1994).

[75] *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission (Dec. 8, 1997).

[76] Maltby, *supra* note 27 at 56.

In summary, the speed, efficiency, reduced cost, and privacy of ADR benefits all parties involved. Removing employment agreements to arbitrate from the FAA's purview would therefore do a great disservice to both employers and employees, not to mention the overwhelmed EEOC and federal court dockets.

VII. The EEOC Has Its Influence On Precedent-Setting Law Expanded And Enhanced The More Employment Discrimination Claims Are Addressed By Arbitrators Rather Than By Courts.

The current EEOC favors ADR generally, but is opposed to pre-dispute binding arbitration agreements. One prominent criticism of workplace ADR programs, including arbitration of employee complaints, is that they are at the price of "court-made" law. The opposite is true. The more arbitrations are used, the fewer the court cases – that is obvious. However, there is no dearth of employment litigation now, despite the ever wider use of ADR, given the explosive growth in employment litigation discussed earlier.[77] In fact, one-third of the current backlog in the federal court system is employment law cases,[78] representing the need *not* for more "court-made" law, but more *focused* "court-made" law.

Expanded use of ADR programs in the employment context – including arbitrations – represents just such an opportunity to sharpen the focus on which cases are most appropriate for precedential value, and for consideration by the courts *and the EEOC*.

If the number of private employment discrimination cases flowing into the courts is dramatically reduced –

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[77] *See* § VI.A. *supra*.

[78] *Id.*

whether because of increased use of arbitrations, or for any other reason – the EEOC will still be a party in just as many cases. Therefore, a higher percentage of EEOC cases would be shaping the law, and the influence of the EEOC on precedent-setting cases would be magnified.

After all, the resources of the EEOC are limited and always will be. On a workplace landscape where ADR is common and well-utilized, the EEOC would have *more* opportunity to advance the issues it deems most appropriate for the courts, and a *greater* concentration of authority in developing our equal employment laws.

VIII. The EEOC Should Adopt A FAA-Regulated Deferral-To-Arbitration Process Parallel To The National Labor Relations Board's.

As a matter of policy, it is appropriate to consider the role of FAA-regulated arbitration in a *labor* context when considering arbitration in an *employment* context.

The National Labor Relations Board ("NLRB") has a well-established deferral-to-arbitration doctrine which was first articulated in *Collyer Insulated Wire*,[79] and has been repeatedly – and without exception – reaffirmed.[80] Under the "Collyer Doctrine," the NLRB routinely defers to the parties' grievance-arbitration process, and only reviews arbitration decisions under very limited circumstances.

There is a key difference: the NLRB defers in a setting where the grievant has union representation. However, the individual in an employment arbitration typically has access to legal counsel, and the employer frequently pays

[79] 192 NLRB 837 (1971).
[80] *See, e.g., National Radio*, 198 NLRB 527 (1972), and *General Am. Transp. Corp.*, 228 NLRB 808 (1977).

the employee's legal fees.[81]

Whether under the National Labor Relations Act ("NLRA")[82] or Title VII, the employee's statutory rights at stake are equally compelling: Is there a significant policy difference in protecting an employee's right *not* to be discriminated against based on his or her union activity vis-à-vis, for example, his or her age?

Currently – except in the Ninth Circuit as a result of *Circuit City Stores* – both the NLRA and Title VII arbitration processes are regulated by the FAA.

However, there is a substantial difference between the approaches of the NLRB and the EEOC. If an employee is fired for his or her union activities, he or she *cannot* have it adjudicated under the NLRA if the collective bargaining agreement has an arbitration provision. Furthermore, the Board will not defer under the "Collyer Doctrine" *unless* the arbitration is binding. The NLRB will only review the outcome of the arbitration if it is contrary to the purposes of the NLRA. (Similarly, the EEOC *could* choose to only review the outcome of an ADR arbitration if it is contrary to the purposes of Title VII or its related statutes.)

By contrast, the EEOC, under its current political configuration, opposes *binding* arbitration, reviews individual complaints at any time in the arbitration/ADR process, and has no formal deferral-to-arbitration policy.

A written agreement between the employee and the employer which provides consent to participate in Alternative Dispute Resolution, including arbitration of employment discrimination claims, *is* analogous to an

[81] *See* § I.B., *supra*.
[82] 29 U.S.C. §§ 151-69 (1988).

arbitration provision in a collective bargaining agreement. Both are consensual agreements involving arbitration of statutory rights, are subject to the FAA, and address fundamental employee rights which are equally deserving.

The EEOC, if it chose to do so, could adopt a *Collyer*-type deferral-to-arbitration doctrine. As a measure of the appropriateness of FAA applicability, and the utility of binding arbitration, the NLRB stands as a model for what could – and should – be the policy of its sister agency, the EEOC.

CONCLUSION

For the foregoing reasons, the Council for Employment Law Equity respectfully urges the Court to reverse the Ninth Circuit Court of Appeals' decision in *Circuit City Stores, Inc. v. Saint Clair Adams.*

Respectfully submitted,

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No. 99-1379

In the

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT SAINT CLAIR ADAMS

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INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association ("NELA") files this *amicus curiae* brief with the consent of all parties.[1] NELA, a voluntary membership organization exceeding 3,000 attorneys, is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Kolstad v. American Dental Association*, ___ U.S. ___, 119 S.Ct. ___ (1999); *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); and *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998).

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[1] Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, NELA states that counsel for respondent, Michael Rubin and Cliff Palefsky, are among the over 3,000 members of NELA, and, as such, pay general membership dues. The undersigned counsel of record, also a NELA member, discloses that he is a panel arbitrator for the American Arbitration Association, which has filed an *amicus curiae* brief in support of reversal of the decision below. No persons other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

The issue of imposed compulsory arbitration—which is at the heart of this case—is currently a major focus of litigation among NELA attorneys and their clients across the country. NELA members' clients will be significantly harmed, as will the public, if employers are permitted to require—as a condition of employment—that employees be compelled to submit any employment related claims to arbitration under rules crafted by their employer, thereby prospectively waiving not only their right to a jury trial, but also their rights to have the civil rights and other employment laws applied and enforced as written.

NELA is familiar with the questions involved in this case and the scope of their presentation and feels that it would be helpful to the Court, and important to the public, to file this *amicus curiae* brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

The employment relationship is an inherently unequal one. Congress recognized this when it considered passage of the Federal Arbitration Act in 1925. In response to persuasive arguments from representatives of organized labor, employment contracts were specifically exempted from the Act. Congress' conclusion that employment agreements were not the sort of contract that should come within the reach of the Federal Arbitration Act was sound—not only did it make good policy sense in 1925, it does so now. Acceptance of the argument made by Petitioner and its *amici* that the language excluding employment contracts from the Act should be read narrowly will devastate this country's ability to enforce the rights of individual, non-represented workers.

This is all the more so because in the ten years since this court decided *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991), the use of mandatory, predispute arbitration agreements has greatly expanded. Employers imposing these agreements on their workers have frequently succumbed to the irresistible temptation to deprive employees of substantive rights and remedies under the guise of choosing "just another forum" for the resolution of employment disputes. Permitting this mass "opt-out" from state and federal civil rights laws affecting the workplace would be profoundly wrong.

ARGUMENT

I. CONGRESS EXEMPTED EMPLOYMENT AGREEMENTS FROM THE FEDERAL ARBITRATION ACT FOR REASONS THAT MADE SENSE IN 1925 AND STILL MAKE SENSE TODAY.

A. Congress Intended to and Did Exclude All Employment Contracts from the Coverage of the FAA.

NELA agrees with Respondent Saint Clair Adams, his *amici* and with the overwhelming consensus of legal scholarship that, in enacting the Federal Arbitration Act (FAA)[2] in 1925, Congress intended to and did exclude *all* contracts of employment from its coverage.[3] At the time

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[2] 9 U.S.C. §1 *et seq.*

[3] *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996) (hereafter, *"Workers' Contracts"*); Finkin, *Employment Contracts under the FAA – Reconsidered*, 48 Labor L.J. 329 (1997); Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv.

(continued...)

the FAA became law, there were very few written employment agreements. There were *some*, however, and the legislative record reflects that Congress was aware that such employment contracts that did exist were *not* the result of equal bargaining power, but were instruments imposed on the weaker employee by the far more powerful employer.

Opposition to the FAA came from organized labor, particularly the International Seamen's Union of America (ISU) which was afraid that arbitration clauses in individual seamen's employment agreements (*not* union contracts) would be specifically enforced if the bill under consideration became law. Arbitrators, the ISU worried, would be more likely than courts to issue orders compelling seamen to serve out the terms of these contracts—essentially imposing involuntary servitude on individual seamen with no power to resist.[4] Andrew Furuseth, the President of the ISU, criticized the arbitration bill on the ground that it would force employees to forfeit the protection of the courts: "[T]he bill provides for the reintroduction of forced or compulsory labor if the freemen through his necessities shall be induced to sign,"

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[3] (...continued)
L.Rev. 591 (1954); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L.J. 1, 19 (1996) and Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U.Pa.L. Rev. 91, 193, n. 438 (1998) ("The federal courts have typically found that the FAA applies to employment disputes despite statutory language that would seem to preclude such coverage.")

[4] *See* Finkin, *"Workers' Contracts," supra*, 17 Berkeley J. of Empl. & Lab. L. 282, 284-88.

Furuseth proclaimed.[5] As the available record clearly reflects, and as is thoroughly discussed in other submissions to the Court in this case, it was this opposition, mounted in conjunction with the American Federation of Labor, that resulted in the ultimate passage of the exclusion in Section 2 of the FAA now under review.

Why did this language end up in the FAA? Other parties and *amici* examine the text and the legislative history of this language of the Act, and demonstrate that the purpose of the additional language was to "prevent[ ] the enactment of any measure designed to fasten any species of compulsory arbitration *upon any group of workers in America*."[6] NELA addresses itself to a closely connected subject its members know well: we argue herein that the unique nature of the relationship between individual worker and employer, a relationship that made it inappropriate *then* (as Congress recognized) and *now* (as this Court should hold) for individual employees to be compelled to accept arbitration.

B. The Employment Relationship Is Inherently Unequal.

Since the Industrial Revolution, employment has been considered to be contractual, the product of a tacit bargain between "servant" and "master" in which the former agrees to perform services in return for a wage paid by

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[5] Proceedings of the 26th Annual Convention of the ISU, 203 - 05 (Appendix to Annual Proceedings) (1924) *quoted in* Finkin, *Workers Contracts*, *supra*, at 289.

[6] *Analysis of H.R. 13522 submitted by President Furuseth to the Convention, Which Was Adopted*, reproduced in Finkin, *Workers' Contracts*, *supra* at 301.

the latter. In the vast majority of employment "contracts," however, the contracting parties are possessed of significantly unequal bargaining power. Typically, the "master" offers terms which the "servant" may either take or leave. Meaningful negotiations rarely occur.

In the past, employees were required to accept twelve- to fourteen-hour days, substandard pay, dangerous working conditions, "yellow dog" clauses, overt, explicit job discrimination, even involuntary servitude as terms of their employment. These deplorable, unilaterally imposed job conditions existed because working people in the early part of the last century were powerless to obtain better "deals" in the countless individual contracts struck for the performance of their labor. As Congress recognized in the preamble to one of its important early twentieth century labor laws, the Norris LaGuardia Act,

> under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract* and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.

47 Stat. 70 (1932), 29 U.S.C. § 102 (emphasis supplied).

This unequal bargaining relationship is far from the sort of negotiation which might take place between, *e.g.*, merchants who wish the convenience of an alternative forum for dispute resolution and who therefore contract with each other for private arbitration. "Take it or leave it" arbitration clauses in employee personnel policies were not what was contemplated by the drafters of the FAA. Unlike businesses dealing with each other at arms' length, most employees represented by members of

NELA cannot actually bargain with a prospective employer as to the selection of a dispute resolution forum. In the vast majority of cases—as in the one at bar—employees must either accept imposed arbitration of disputes as a condition of employment, or attempt to find another job. They find themselves in the very dilemma presciently described by ISU President Furuseth seventy-five years ago:

> Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in 'Interstate and Foreign Commerce.'[7]

Nor, as this Court has recognized, are these individual employment agreements the same as union contracts. Collectively bargained arbitration mechanisms have a long and honorable history in the unionized workplace. Their historic role in explicating and illuminating "the law of the shop" was approved by this Court in the *Steelworkers Trilogy*,[8] but the arbitration contemplated therein is completely and fundamentally at odds with the values at stake in cases like this. First and most im-

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[7] Proceedings of the 26th Annual Convention of the ISU, 203 - 05 (Appendix to Annual Proceedings) (1924) *quoted in* Finkin, *Workers Contracts*, *supra*, at 289.

[8] *United Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

portant, the labor arbitration language reviewed in the *Steelworker* cases had been agreed to by parties of roughly equal bargaining power. The unions agreeing to this mechanism had the power—and frequently used it—to bring an employer's business to an unceremonious halt if they chose to do so. Collective bargaining agreements containing arbitration clauses were then perceived to be—and still are—contracts between equals. Second, the Court recognized the unique trade-off inherent in collective bargaining: the finality of arbitration in exchange for labor peace. Arbitration was the *quid pro quo* for an agreement not to strike for the contract's term. Third, the *Trilogy* recognized that the labor arbitrator is given a limited role: to interpret and decide *contract* issues arising out of the collective bargaining agreement itself, not to rule on issues of public law.[9]

Even so, this Court has recognized limitations on arbitration to the extent it implicates statutory claims brought by union-represented workers. It is now well settled that unionized employees are not required to arbitrate statutory and other public policy claims that do not involve interpretation of the collective bargaining agreement under which they work. Arbitration exists only to give ongoing life to the document which fixes the

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[9] *See, United Steelworkers v. Enterprise Wheel & Car, supra,* 363 U.S. 593; *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co., supra,* 363 U.S. 564. *See also,* J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 Wash. U. L.Q. 637, 642-43, 653-54 (1996); D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wisc. L.R. 33, 72-73, n. 130 (1997)

"rule of the shop" in which they work.[10] This Court, lower courts and numerous commentators have recognized the obvious and vast difference between arbitration in the organized labor context and in the individual employee context.[11]

Simply put, the "contract" between the individual employee and his or her employer may not be analyzed as if it were either a commercial deal between merchants who wish the convenience of an alternative forum *or* as if it were a mechanism arrived at between union and employer for resolving grievances. It is something entirely different.

C. Because The Employment Relationship Is Inherently Unequal, It Has Been The Subject Of Extensive State and Federal Regulation.

Since the beginning of the twentieth century, as lawmakers began to grapple with the excesses of the Indus-

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[10] *See, Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 45 (1974); *Lingle v. Norge,* 486 U.S. 399, 108 S.Ct. 1877 (1988); *Wright v. Universal Maritime Services,* 119 S.Ct. 391 (1998).

[11] *See, Gilmer v. Interstate Johnson/Lane Corp.,* 500 U.S. 20 (1991); *Cole v. Burns Intern'l Security,* 105 F.3d 1465, 1476-1477 (D.C. Cir. 1997) (questioning the validity of imposing the model of collective bargaining agreement arbitration on individual employment situations where employees are attempting to enforce public statutory rights, and noting the structural protections for employees inherent in the union/collective bargaining arena); Sternlight, *Panacea, supra,* pp. 642-43 (labor arbitration as a substitute for a strike is entirely different from individual arbitration as a substitute for public judicial proceeding); J. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns,* 72 Tulane L.R. 1, 7 (1977)

trial Revolution, Congress and state legislatures throughout the country began enacting protective legislation to protect the rights of the individual employee so that today, a vast number of statutes restrict an employer's freedom to impose terms of employment on working people. For example, federal and state laws in effect throughout the country since very near the beginning of the twentieth century prohibit the use of child labor.[12] Others, in place since the First World War era and after provide a "no-fault" system of benefits for those injured at work.[13] Depression-era unemployment insurance regulations provide a "safety net" for those suddenly deprived of work through no fault of their own.[14] Wage and hour laws regulate the minimum amounts employers may pay their employees and the maximum number of hours they may require those employees to work.[15]

In addition, during the Great Depression, Congress and many state legislatures saw fit to confer on employees the right to organize, to form and join unions or to oppose unionization.[16] California Labor Code § 923, for example,

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[12] *See, e.g.*, 29 U.S.C. § 212; Cal. Lab. Code §§ 1285-1312, 1390-1399.

[13] *See, e.g.*, Cal. Workers' Compensation Act, Cal. Lab. Code §§ 3200-6208.

[14] *See, e.g.*, Cal. Unemployment Insurance Act, Cal. Unempl. Ins. Code §§ 1-16010.

[15] *See, e.g.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219; Cal. Lab. Code §§ 1171-1204.

[16] *See, e.g.*, the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-168. Congress noted that passage of the NLRA was necessary because of, "The inequality of bargaining power between employees . . . and employers . . . ." 29 U.S.C. § 151.
(continued...)

articulates the public policy of the State of California in terms which echo both the NLRA and the Norris LaGuardia Act:

> Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, *the individual unorganized worker is helpless to exercise actual liberty of contract* and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore, it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[17]

Since the Depression, Congress has regularly involved itself with the employee-employer relationship in order to protect the rights of employees.[18] The NLRA and other early enactments have been followed by a comprehensive

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[16] (...continued)
The NLRA was designed to "restor[e] equality of bargaining power between employers and employees." *Id.*

[17] Cal. Labor Code § 923 (West, 1989) (emphasis supplied).

[18] In 1937 this Court held that the NLRA was a valid exercise of Congressional power under the Commerce Clause. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

array of additional statutes enacted to protect employee rights.[19] Each of these acts, individually, serves as a strong statement of policy by Congress.[20]

Throughout the country, state legislatures have in many instances addressed employment inequities *before* Congress got to them. California's employment discrimination act, for instance, was first enacted in 1959 as the "California Fair Employment Practices Act" and revised in 1980 as the "California Fair Employment and Housing Act," (FEHA).[21] Section 12920 of the FEHA announces as the public policy of the state of California

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[19] *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17; the FLSA, 29 U.S.C. §§ 201-219; the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634; the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796; and the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12113.

[20] Title VII of The Civil Rights Act of 1964, for example, represents an "important congressional policy against discriminating employment practices." *Alexander v. Gardner-Denver Co., supra*, 415 U.S. 36, 45. *See also,* FLSA, 29 U.S.C. § 202(a) (FLSA enacted to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"); the Equal Pay Act, Pub. L. No. 88-38 § 2 (EPA passed to cure a variety of social ills caused by wage differences based on sex); *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. at 27 (the ADEA was designed "to further important social policies"); the Rehabilitation Act of 1974, 29 U.S.C. § 701 (Rehabilitation Act reflects national policy of respect for individuals with disabilities); the ADA, 42 U.S.C. § 12101(b)(2) (purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities").

[21] Cal. Gov't. Code § 12900, *et seq*.

> that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.[22]

In enacting the comprehensive scheme underlying the FEHA, the California legislature sought to ensure a full range of remedies for victims of discrimination.[23] Thus, employees who bring claims for discrimination are not only entitled to the full range of tort remedies,[24] but are entitled to an award of attorney's fees should they prevail.[25] And, even though an administrative scheme exists for resolution of such claims,[26] victims of employment discrimination are *always* entitled to bring their statutory claims in a civil court action.[27]

Taken together, these state and federal statutes represent strong policies which protect employees from discrimination or other wrongful workplace conduct when they cannot protect themselves due to the vastly superior bargaining power of their employers. These laws—and many, many others like them—were passed at different

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[22] Cal. Gov't. Code § 12920.

[23] "It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices." Cal. Gov't. Code § 12920.

[24] *Commodore Home Systems v. Superior Court* (1982) 32 C.3d 211, 185 C.R. 270.

[25] Cal. Gov't. Code § 12965(b).

[26] Cal. Gov't. Code § 12960 *et seq*.

[27] Cal. Gov't. Code § 12965.

times and in response to different economic, political and social circumstances. But they represent far more than a patchwork of haphazard workplace regulations. Together, they are a powerful legislative statement that there is something *different* about the workplace, something that invites, indeed requires, a governmental presence.

D. Circuit City's Dispute Resolution Procedures Exemplify The Unfair Arbitration Provisions Forced On Individual, Non-Represented Employees.

The Respondent in this case, Saint Clair Adams, invoked the protection of the California FEHA when he filed the underlying lawsuit in this case in state court. In response, Circuit City sued Mr. Adams in the U.S. District Court for the Northern District of California to enjoin his state court suit and to compel arbitration under its "Dispute Resolution Agreement" (DRA). These procedures, which designate the American Arbitration Association (AAA) as the administrator of arbitration arising under them, significantly limit the rights of Circuit City's employees (though not of Circuit City) in the following ways: (1) They impose a one-year statute of limitations on all claims, including claims that have longer limitations periods under California law. (2) They obligate employees to pay half the cost of any arbitration, including arbitrator fees and expenses. (3) They vest complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee, even on statutory discrimination claims. (4) They cap the amount of front pay or punitive damages that an arbitrator could award. (5) They do not require the arbitrator to provide findings or reasoning in support of the arbitration award.

These material limitations on otherwise available remedies, taken together with the imposition of significant forum costs, make it clear that Circuit City's rules are something quite different from a straightforward proposal to its employees for "another forum" in which to resolve disputes.

Although there is no indication that Circuit City ever told Mr. Adams this, it is doubtful that—if the AAA were to follow its own oft-stated policy—it would agree to administer the arbitration in this case should it ever take place. As the AAA has explained to this Court in its *amicus* submission, it is a signatory to the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship" (hereafter, "the Due Process Protocol"), a document drafted by representatives of the AAA, the National Academy of Arbitrators (NAA), the Labor and Employment Law section of the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution, and NELA. As the AAA points out,

> The Due Process Protocol requires that all participants in arbitration be accorded, *inter alia*, the right to a neutral third party decision maker, the right to select the arbitrator from a diverse pool, the right to counsel, the right to discovery as authorized by the arbitrator, the right to *the same remedies as those available in court (including the right to an award of attorneys' fees in conformity with the law), and the right to a written opinion.*[28]

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[28] Brief *Amicus Curiae* of the American Arbitration Association in Support of Reversal at p. 7.

It is also the case, as the AAA tells this Court, that it will decline to administer an arbitration program not in compliance with the due process protocol: "If the AAA determines that a dispute resolution program *materially deviates* from these due process standards, the AAA will decline to administer cases under that program."[29]

There can be no doubt that Circuit City's arbitration program falls far short of the Due Process Protocol. As noted above, it substantially shortens limitations periods, constricts the remedies an arbitrator can award and does not provide for a written decision which would enable a party to seek judicial review. Circuit City's arbitration program is deficient in other respects, as well: since it imposes substantial costs on the employee and since it permits the employer, but not the employee access to court, it does not even comply with current California law.[30]

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[29] *Id.* Given that the AAA has taken a position *in this case* in favor of Petitioner and against Respondent, it is hard to imagine how Mr. Adams could feel that he would have the benefit of "a neutral third party decision maker" (required by the Due Process Protocol) should his dispute with Circuit City end up being administered by the AAA.

[30] The California Supreme Court recently held a pre-employment agreement to arbitrate employment discrimination claims unenforceable on the grounds that it violated public policy and was unconscionably unilateral. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, ___ Cal.4th ___, ___ P.2d ___, ___ Cal.Rptr. 2d ___, 2000 Cal. LEXIS 6120, No. S075942 (August 24, 2000), the court held that such agreements may be valid and enforceable, but only if they incorporate substantive and procedural protections. Specifically, they must allow for recovery of all types of relief otherwise available in court. They must also provide for neutral arbitrators, adequate discovery, and written arbitration awards. The (continued...)

E. There Is No "Public Policy' That Favors Enforcement Of Compulsory Arbitration Made A Condition Of Employment.

When he filed his state court lawsuit, Respondent invoked the FEHA, California's unequivocal statutory prohibition against employment discrimination that has been in place since the fifties. That statute explicitly provides for access to California's courts.[31] Its protections may not be waived.[32] The long history of legislation to protect those powerless to protect themselves—of which the FEHA is a part—and the social policy it represents, must prevail over the so-called "policy" favoring arbitration to which Circuit City and its *amici* herein enthusiastically refer. Indeed, the "policy" they invoke is *not* a policy favoring *all* arbitration. Rather, it is a policy favoring *voluntary* arbitration, and, of course, arbitration under agreements *covered* by, rather than *excluded* by, the FAA.

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[30] (...continued)
agreement may not require the employee to pay "either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Id.*, slip opinion at 18.) Finally, the agreement must evidence "a modicum of bilaterality," (*id.* at 39), that is, the employee cannot be bound to submit his claims to arbitration if the employer is free to litigate its claims in court.

[31] California Government Code §12965 vests "the superior and municipal courts of the State of California" with jurisdiction over FEHA claims.

[32] "It is indisputable that an employment contract that required employees to waive their rights under the FEHA to redress sexual harassment or discrimination would be contrary to public policy and unlawful." *Armendariz v. Foundation Health Psychcare Services, Inc., supra*, ___ Cal. 4th ___, ___ P.2d ___, ___ Cal.Rptr. 2d ___, 2000 Cal. LEXIS 6120, slip opinion at p. 12.

The district court in this case relied on this supposed policy "favoring" arbitration. It mistakenly pointed to the FAA and claimed that its passage was meant to indicate a new "preference" for arbitration of employment disputes. The district court got it wrong. *First,* a statute such as the FAA *cannot* create a "public policy" which contradicts the right to a jury trial and access to an Article III court. *Second,* the FAA was passed 40 years before the first federal employment discrimination laws were enacted. Thus, the FAA cannot be deemed to have ever created a "policy" superseding the provisions of the civil rights laws which ensure victims of discrimination access to federal courts and the right to a jury trial.

Third, the FAA was never intended to create a "preference" for arbitration of statutory employment disputes, much less a "public policy" favoring arbitration of them. The original intent of the FAA was simply to allow *commercial* entities of *equal bargaining power* the right to use arbitration as a dispute mechanism, at a time when arbitration was held in such low regard that many courts flatly refused to enforce pre-dispute arbitration agreements, even if they were voluntary.

In sum, Congress passed the FAA not to give a "preference" to arbitration, but simply to allow courts to *permit* arbitration of contractual matters arising out of "transactions" between commercial entities when such agreements were wholly voluntary. There is a vast difference between removing a "prohibition" on arbitration and creating a "preference" for it.

Moreover, the knowing and voluntary consent to an alternative method of resolving a workplace dispute is simply not present in the employment relationships entered into by those workers whom NELA members represent. These employees, like Respondent in this case,

are faced with "take it or leave it" policies which require them to accept an alternate—and often highly suspect—forum as a condition of employment. Coercion, not consent, lies beneath such agreements, and they cannot be held to be consistent with a federal policy in favor of arbitration.

This Court recognized this crucial distinction when it held that a "liberal" federal policy favoring arbitration simply means that if two parties have entered into a valid, *consensual* agreement to arbitrate, courts should thereafter liberally construe the *scope* of that agreement.[33] And in 1995 the Court reemphasized the point, making it clear that:

> the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that *commercial* arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.[34]

Thus, the language of the statute, its unequivocal legislative history and this Court's recent pronouncements all point in the same direction: Congress excluded agreements between employers and employees like Circuit City and Mr. Adams from the reach of the FAA.

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[33] *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-27, 105 S.Ct. 3346 (1985).

[34] *First Options v. Kaplan,* 514 U.S. 938, 115 S.Ct. 1920, 1925 (1995) (emphasis added).

II. EXPERIENCE DURING THE TEN YEARS SINCE THIS COURT'S DECISION IN *GILMER* DEMONSTRATES THAT IT IS NO LONGER POSSIBLE TO PRESUME THAT THE ARBITRAL FORUM IS AN ADEQUATE SUBSTITUTE FOR THE COURTROOM.

In *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991), to be sure, this Court upheld an arbitration agreement which required arbitration of a statutory age discrimination claim.[35] Petitioner and its *amici* conclude therefrom that *any* agreement, no matter how unbalanced, may be the vehicle for the disposal of *any* employment claim no matter how fundamental. They are wrong.

The ruling in *Gilmer* was based on at least two critical assumptions neither one of which NELA respectfully suggests applies to the dispute now before the Court. First, in *Gilmer* this Court stated that, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[36] In other words, this Court accepted at face value—in the absence of proof before the Court to the contrary—that arbitration of statutory employment disputes would be "just another forum," essentially equivalent to federal court for purposes of vindicating statutory rights.

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[35] The court in *Gilmer* merely held that parties *could* arbitrate an ADEA case. It made it clear that Mr. Gilmer was not contending that he was "coerced" into signing the arbitration clause contained in his U-4 registration document. Thus, the *Gilmer* decision does not support the concept that employers may condition employment upon an arbitration agreement for statutory claims.

[36] *Gilmer*, 500 U.S. at 26.

This Court's second critical assumption in *Gilmer* was that, "the prospective litigant *effectively may vindicate [his or her] statutory cause of action in the arbitral forum*," such that the specific statute at issue would "continue to serve both its remedial and deterrent function."[37]

In the context of employer-mandated arbitration, it is NELA's experience that both of these assumptions have proven woefully unfounded. Arbitration is *not* "just another forum," and individual employees are *not* able to vindicate effectively their statutory rights. Employees *do* lose substantive rights when they are coerced into private arbitration, including the right to have the civil rights laws applied and enforced as written. The result is that the remedial and deterrent functions of the nation's employment laws are being undermined.[38] When employers are allowed to condition employment on the acceptance of arbitration, they too often use them—as Circuit City does—to tip the dispute resolution mechanism in their favor and thereby evade the reach of public law. For good reason, one court described such an overreaching arbitration agreement as "the contract between the rabbits and foxes."[39]

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[37] *Gilmer*, 500 U.S. at 28 (emphasis added).

[38] This Court has long recognized that the choice of forum may materially affect the substantive rights to be vindicated in Title VII cases. As the Court explained in *Alexander*, "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." *Alexander v. Gardner-Denver*, *supra*, 415 U.S. at 57.

[39] *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 861 (W. Va. 1998) (quoting *The Board of Education of the*

(continued...)

As a result, courts have been swamped with litigation as employers and their employees square off over deficient arbitration agreements of all sorts and types. In but one notorious example, the Fourth Circuit reviewed a pre-dispute arbitration agreement and found it to be "so one-sided" as to be a clear attempt by the employer to "undermine the neutrality of the proceeding."[40] The arbitration clause at issue in that case was especially egregious in that it, among other things, required the employee to make extensive one-sided disclosures about her case, ensured that the decision maker selected would be biased in favor of the employer and allowed the company to change the rules of the arbitration even in the middle of a proceeding. *Id.* at 938-39. Another common method used by employers to take advantage of superior bargaining power is to make the arbitration obligation run in only one direction, requiring the employee to arbitrate but allowing the employer to bring its disputes to the courthouse.[41]

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[39] (...continued)
County of Berkeley v. W. Harley Miller, Inc., 236 S.E.2d 439 (W. Va. 1977) (describing a consumer contract's arbitration clause)).

[40] *Hooters of America Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

[41] Circuit City's agreement has this feature. *See also Hull v. Norcom, Inc.*, 750 F.2d 1547, 1549 (11th Cir. 1985) (finding unenforceable an agreement whereby the employer reserved the right to "raise and resolve any and all disputes" in a court of law "rather than through arbitration"); *Kinney v. United Healthcare Servs. Inc.*, 70 Cal. App. 4th 1322, 1325-26 (1999) (declining to enforce an arbitration agreement that bound the employee to arbitrate her disputes but allowed the employer recourse to the courts); *Stirlen v. Supercuts, Inc.*, 51 Cal. App.
(continued...)

We have also seen arbitration agreements that:

limit remedies an employee may recover by excluding tort damages and/or punitive damages;[42]

require employees to finance significant portions of the arbitration process;[43]

limit discovery;[44]

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[41] (...continued)
4th 1519, 1528 (1997) (refusing to enforce an arbitration clause that exempted actions initiated by the company from arbitration while requiring the employee arbitrate his claims)

[42] Again, this is an advantage Circuit City secured for itself. See, also, *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (11th Cir. 1998); *Stirlen v. Supercuts, supra*, 51 Cal. App.4th 1519; *Great Western Mortgage Co. v. Peacock*, 110 F.3d 222 (3rd Cir. 1997); *Hooters of America v. Phillips, supra*, 173 F.3d 933, 938; *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027-28 (D.N.M. 1996); *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533 (D. Md. 1999), *aff'd sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir.), *cert. denied*, 120 S. Ct. 2744 (2000).

[43] Once again, the DRA does this. *See, also, Shankle v. B-G Maintenance Mgt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Davis v. LPK Corp.*, 76 Fair Empl. Prac. Cas. (BNA) 954 (N.D. Cal. 1998); *Fuller v. Pep Boys — Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158, 1162-63 (D. Colo. 2000); *Jones v. Fujitsu Network Commun., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999); *Cole*, 105 F.3d at 1485; *McWilliams v. Logicon, Inc.*, No. CIV. A. 95-2500-GTV, 1997 WL 383150, at *2 (D. Kan. June 4, 1997), *aff'd*, 143 F.3d 573 (10th Cir. 1998).

[44] *Penn v. Ryan's Steakhouses, Inc.*, 95 F. Supp. 940 (N.D. Ind. 2000); *Hooters of America v. Phillips, supra.*

establish a panel of arbitrators controlled by the employer;[45]

require arbitration in a distant location;[46]

shorten applicable statutes of limitations;[47] and

preclude or limit awards of attorneys fees or costs, regardless of whether statutes provide such remedies to prevailing plaintiffs.[48]

While it is not surprising that the foxes will ensure that they would have the upper hand in contracts they know the rabbits must accept, these one-sided agreements have led to a flood of litigation. Circuit City's arbitration program alone has been the subject of eleven reported cases of which this *amicus* is aware.[49] The

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[45] *Cheng-Canindin v. Renaissance Hotel* (1996) 50 Cal.App. 4th 676; *Penn v. Ryan's Steakhouses, Inc., supra,* 95 F. Supp. 940; *Hooters of America v. Phillips, supra; Graham v. Scissor-Tail* (1981) 28 Cal.3d 807, 623 P.2d 165).

[46] *Patterson v. ITT Consumer Financial* (1993) 14 Cal.App.4th 1659, 18 Cal.Rptr.2d 563.

[47] Circuit City's DRA does this. *See, also, Graham Oil v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *supra*; *Stirlen v. Supercuts, supra.*

[48] *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459 (S.D. N.Y. 1997); *Stirlen v. Supercuts, supra; Paladino v. Avnet Computer, supra; Hooters of America v. Phillips, supra; Graham Oil v. ARCO, supra.*

[49] *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998) (adequate consideration for DRA when both parties agreed to be bound by the arbitration process); *Johnson v. Circuit City Stores, Inc.*, No. 99-1449, 2000 U.S. App. LEXIS 370 (4th Cir. Jan. 12, 2000) (per curiam) (on remand, the district court held the DRA unenforceable because it failed to

(continued...)

courts in virtually every jurisdiction in the country are experiencing similar frequent recurrences of litigation over the issue.

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[49] (...continued)
provide the full set of remedies to which Johnson would be entitled to under §1981); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) (Circuit City's promise to be bound by arbitration itself served as adequate consideration for DRA); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 1279 (N.D. Ala. 2000) (same; exclusion language in the FAA should be read narrowly to apply only to employment contracts for workers actually engaged in the movement of goods in interstate or foreign commerce); *Circuit City Stores, Inc. v. Shelton*, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000) (EEOC's decision to commence action against Circuit City does not obligate either the EEOC or individual employee to arbitrate claims); *Gannon v. Circuit City Stores, Inc.*, No. 4:00CV330 JCH, 2000 U.S. Dist. LEXIS 12125 (E.D. Mo. July 10, 2000) (DRA does not adequately protect employee's substantive rights because it limits the amount of punitive damages); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815 (S.D. Ohio 1999) (FAA should be read narrowly); *Sportelli v. Circuit City Stores, Inc.*, No. 97-5850, 1998 U.S. Dist. LEXIS 316 (E.D. Pa. Jan. 13, 1998) (plaintiff, a Circuit City employee prior to the imposition of the DRA, opted out of DRA, thus was not bound to compulsory arbitration); *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491 (E.D. Va. 1999) (district court lacked subject matter jurisdiction in case in which the EEOC asserted no waiver of sovereign immunity); *Ramirez v. Circuit City Stores, Inc.*, 90 Cal. Rptr. 2d 916 (Cal. Ct. App. 1999), *rev. granted*, 94 Cal. Rptr. 2d 1 (Cal. 2000) (DRA held to be unenforceable on the basis of unconscionability by intermediate court of appeal; review granted by the California Supreme Court); *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486 (Tex. App. 1997) (since plaintiff, another employee employed before the DRA went into effect, had the opportunity to opt out and did not, DRA not fraudulently induced or unconscionable).

Circuit City and its *amici* go to great lengths to praise the current system of employment arbitration that the AAA and others administer.[50] Workers and their representatives have a different perspective. Despite what Circuit City and its *amici* say, workers and attorneys representing workers do not favor mandatory pre-dispute arbitration and do not believe that such arbitration furthers the important statutory goals in state and federal anti-discrimination laws. Why, if arbitration is so fair, do employers have to impose it on workers as a condition of employment?

NELA and its members are *not* opposed to Alternative Dispute Resolution. NELA's members represent individuals in employment mediation *and* arbitration all the time. Indeed, we often *elect* arbitration where, after a dispute has arisen, it appears that justice will best be served thereby. But it is only when our clients *knowingly* and *voluntarily* make such elections that arbitration is appropriate. Especially since this Court has made it clear that arbitration is a matter of consent, not coercion, we believe firmly that the concept of voluntariness is essential to the very definition of arbitration, as well as to the fairness and appropriateness of how it is carried out. Contrary to the expressions of petitioner and its *amici*,

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[50] *See, e.g.* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at pp. 15, 18-19; Brief of *Amicus Curiae*, the Counsel for Employment Law Equity in Support of the Petitioner at pp. 5, 12, 13 and 24; Brief of *Amicus Curiae* Securities Industry Association in Support of Petitioner at pp. 13-15; Brief *Amicus Curiae* of the Texas Employment Council in Support of Petitioner at p. 25; Brief *Amicus Curiae* of the Equal Employment Advisory Council and LPA, Inc. in Support of Petitioner at pp. 12-17, and Brief *Amicus Curiae* of the American Arbitration Association in Support of Reversal at pp. 10-12.

there simply is no policy favoring mandatory arbitration. In enacting the FAA, Congress meant nothing more than to encourage voluntary resolution of commercial disputes outside of the courts; it did *not* intend to set up a separate and unequal system of justice for unrepresented employees.

CONCLUSION

Congress was aware of the disparity in bargaining power between employers and workers in 1925 and exempted all employment contracts from the FAA for that very reason. That disparity still exists, and the FAA should not be "interpreted" to cover a class of agreements Congress explicitly, and for good reason, chose to exempt. The decision of the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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September 19, 2000

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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE RESPONDENT

INTEREST AND CONCERN OF THE AMICUS[1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by the Board of Governors after careful consideration of their qualifications by its membership

[1] Rule 37 statement: Counsel of record is the author of this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented to its filing.

Committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as an impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception have obtained general recognition through scholarly publication or other activities as an impartial authority in labor-management relationships. The average member has been an arbitrator for 26 years. Members are prohibited from serving as advocates for either labor or management. As of May, 2000, the Academy had 624 American and Canadian members. The Academy is not (as the American Arbitration Association is) an appointing agency. It receives no funding from either employers or unions but is supported financially only by the dues and assessments paid by its members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management *and employment disputes* [2] on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibilitya sense of social responsibility for advancing desirable goals lying outside and beyond one's personal or

[2] Added in 1993.

> group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[3]

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements (grievance arbitration) but also at times involving questions as to what the terms and conditions of new agreements should be (interest arbitration). Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination was not traditionally a function of labor arbitration. Recognizing that such arbitration has, however, become part of the American landscape the Academy amended its constitution and by-laws in 1993 to encompass study and educational activity with respect to non-union employment arbitration. Although the Academy has continued to limit its membership to those accomplished in traditional grievance arbitration, almost half of its members have arbitrated non-union employment cases.[4]

In submitting this amicus curiae brief the Academy speaks for the interests of neither the labor and trial lawyers supporting the respondent nor the employers supporting the petitioner. Our viewpoint, rather, is of those engaged as neutrals in the arbitration process who support and cherish it. Arbitration has achieved its place in American industrial life because it is a freely chosen procedure. In the unionized sector it is chosen by unions and employers as the alternative to economic conflict. In

[3] Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 18.

[4] M. Picher, R. Seeber & D. Lipsky, *The Arbitration Profession in Transition* 16 (2000). This work, No. 3 in the Cornell Studies in Conflict and Dispute Resolution, is a report on a comprehensive survey of the members of the National Academy.

other employment it was traditionally so chosen as a freely-negotiated alternative to litigation over potential disputes as to the negotiated terms and conditions of employment. Only since this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) has it widely become a condition of employment for the resolution of disputes as to violation of laws protecting employee rights imposed on unrepresented workers who have in fact no choice but to accept. Because most of our members believe that this practice will in the end have the effect of undermining the respect and approbation that arbitration has achieved as a voluntarily adopted alternative dispute mechanism, the Board of Governors of the Academy adopted the following policy statement on May 21, 1997:

> The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.

The arbitration agreement in this case that the Ninth Circuit refused to enforce provides precisely for "mandatory employment arbitration as a condition of employment requiring waiver of direct access to a judicial forum for the pursuit of statutory rights." Since, in the view of most members of the Academy, such enforcement will in the end be detrimental to the arbitration process we submit this brief in support of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

Arbitration is a highly desirable form of dispute resolution only if it is freely chosen. Employee agreements to arbitrate future disputes are of two kinds. There are those that are freely negotiated as part of a contract of employment specifying the terms of that employment. Those, we believe, should be federally enforceable. The second kind are those, like that in this case, that are imposed as a condition of employment for the purpose of requiring arbitration of statutory claims. Those, we

believe, should not be. The exemption in Section 1 of the Federal Arbitration Act, if properly construed as a whole, can help to distinguish the two.

As the Ninth Circuit held, the exemption should not be limited to the contracts of those engaged in interstate transportation. But it should be limited, as it says, to contracts of workers who, as Congress has declared, are "helpless to exercise actual liberty of contract." Contracts of executives and other management employees are not within the exemption. Properly construed, the exemption does not apply to ad hoc agreements by workers to arbitrate existing disputes or to agreements that give workers an option to arbitrate future disputes when they arise. Where the exemption applies the enforceability of workers' agreements to arbitrate claims of violation of state law should be left to the states.

The Academy supports arbitration when it is freely and knowingly agreed to. The exemption in Section 1 of the FAA if properly construed can serve to enhance arbitration while avoiding an abuse detrimental to the process.

ARGUMENT

Introduction

Since this Court's *Gilmer* decision millions of Americans have become parties to agreements to arbitrate their disputes with their employers. The U.S. General Accounting Office has estimated that by 1997 19% of employers utilized arbitration to resolve employment disputes.[5] This enormous growth in the volume of arbitration agreements, however, includes vastly different kinds of agreements. On the one hand there are agreements such as that involved in *Asplundh Tree Expert Co. v. Bates*, 71 F.3rd 592 (6th Cir. 1995). That case arose from a dispute as to whether the corporation that had employed Bates as a

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[5] U.S. General Accounting Office, *Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace, GAO/GGO-97-157*, 2 (1997).

chief executive officer was required to pay him the salary, fringe benefits and costs specified in his negotiated employment agreement containing an arbitration provision. As noted in the amicus brief of the American Arbitration Association, fully half of the employment arbitrations filed with it are of this kind, resulting "from individual employment contracts that contain a *negotiated* arbitration clause." [6] (Emphasis added.) The arbitration "agreement" in this case, on the other hand, was not negotiated. It was required to be executed as a condition of obtaining employment. It explicitly gives the employee no right to anything — no wages, no benefits, no limitation on discharge. Its only purpose is to require arbitration of claims of violation of law.[7] The two are as different as day and night. But they are argued by petitioner and its supporting amici to be equally enforceable under the Federal Arbitration Act.

The Academy believes, with the AAA, that provisions of the Bates type should be enforced as a matter of federal law; they are freely negotiated, consensual, agreements. We believe that agreements of the kind represented by this case should not be. Unlike the AAA, which urges reversal of the Ninth Circuit but, with good reason,[8] does not explicitly support the petitioner, we believe that this result can be achieved by construing the commerce requirement in the exemption in Section 1 in accordance with the opinion of the Ninth Circuit but paying strict attention to the other limitations in the exemption.

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[6] Brief Amicus Curiae of the American Arbitration Association In Support of Reversal 10.

[7] J.A. 31

[8] The Circuit City Stores agreement in this case requires the employee to pay half the costs of the arbitration and, potentially, Circuit City's costs if it prevails in the arbitration. (J.A. 34) It puts limits on the back pay, front pay and punitive damages that an arbitrator can award that are not applicable in court. (J.A. 35) Under its rules the AAA would decline to administer a case under that agreement. Brief of the AAA, *supra n. 6*, 7.

I. THE NINTH CIRCUIT'S READING OF THE COMMERCE LIMITATION IN THE EXEMPTION MAKES SENSE

The exemption in Section 1 excludes from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The conflict between the Ninth and the other Circuits concerns the interpretation to be given to the commerce limitation. The debate is about whether "engaged in" commerce in the exemption should be read the same as or more narrowly than "involving" commerce in the coverage provision in Section 2. We can add little to that debate. Suffice it to say that attempting to read back into the Congressional mind the distinction between the two as adumbrated in the decisions of this Court in other contexts verges on scholasticism. The parties, and other amici, we are sure, will worry to death the subtleties of the language involved.

The language is certainly ambiguous. On the one hand, "engaged in" commerce can be read, as all the Circuits except the Ninth have held, to mean participating or taking part in commerce as distinguished from "involving," i.e. affecting commerce. On the other hand, the difference more probably is purely syntactical. "Engaged" is used in describing persons while "involving" is used in describing transactions; one could not say that a person was "involving" commerce or that a transaction was "engaged in" commerce.

Despite the ambiguity of the commerce requirement, three things are clear. First, the commerce requirement in the exemption is related to the employee, not the employer. Under the restrictive, transportation, view of that requirement an interstate truck driver's agreement would be exempt but that of other employees of the same employer would not be.[9] Second, and more

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[9] *See*, e.g. *BWI Companies v. Beck*, 910 S.W. 2d 620 (Tex. App. 1995). This was also the case under the Fair Labor Standards Act until it was

important, there is no indication that the Congress that passed the Act paid any attention whatsoever to the supposed difference in language. What is plain from the history of the exemption, as carefully described by Profession Finkin,[10] is that it was hastily drawn and adopted without any discussion or attempt at definition with a simple objective: getting rid of the objection of the labor movement to a statute that the American Bar Association and the administration, through Secretary Hoover, wanted passed to satisfy commercial needs. Finally, the exemption must be interpreted as part of a statute that has been transformed by the decisions of this Court, over vigorous dissent, from one governing procedures in the federal courts to a substantive statute overriding state law.[11]

Under these circumstances the Court should not make a fortress of a dictionary[12] but rather attempt to make sense of the exemption. That requires consideration of the exemption as a whole. The commerce limitation in it made no sense in 1925, and makes no sense today, if it is read to exclude arbitration agreements signed by interstate truck drivers from the FAA but

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amended in 1961 to make coverage depend on the relationship to commerce of the employing "enterprise." See *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973).

[10] Matthew W. Finkin, *"Workers Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. Lab. L. 282 (1996) (hereinafter Finkin), Matthew W. Finkin, *Employment Contracts Under the FAA — Reconsidered*, 48 Lab. Law. J. 329 (1997).

[11] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[12] As Judge Learned Hand put it in *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd* 326 U.S. 404 (1945): "Of course it is true that the words used even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest index of a mature and developed jurisprudence not to make a fortress of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imagination discovery is the surest guide to their meaning."

to include local drivers working for the same employer and working out of the same terminal. On the other hand, a broad reading of the commerce requirement makes no sense either if the other limitations of the exemption are ignored and all agreements to arbitrate by employees subject to Congressional power are exempt from the FAA. Our contribution will be an attempt to provide a sensible reading of the entire exemption, one that will be consistent with a policy supportive of arbitration but antithetical to its abuse. That requires, we believe, focus on an issue simply overlooked in the linguistic debate about the commerce limitation: the language of the other terms of the Section 1 exemption. Properly interpreted those terms will, we believe, both make sense of the exemption and help to distinguish between the two different kinds of arbitration agreement we have described.

II. SECTION 1 DOES NOT REQUIRE THE EXEMPTION OF ALL CONTRACTS OF EMPLOYMENT

Astonishingly, the petitioner and the amici supporting it, as well as the Ninth Circuit and Professor Finkin, say that if the commerce requirement in the exemption in Section 1 is met all contracts of employment are exempted by the section.[13] This is astonishing because the exemption by its explicit terms does not so apply. Section 1 does not exempt all contracts of employment but only those entered into by certain kinds of employees, those specifically named *and* members of the class of "workers." The term "workers" is not defined but it has a definite meaning in common parlance. It excludes executives and, indeed, all management employees. Webster's Third New International Dictionary says that "worker" is synonymous with laborer or toiler, "one who is employed especially at manual or industrial labor

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[13] Finkin asserts broadly that the Act "exempts contracts of employment, all contracts of employment over which Congress had constitutional authority." Finkin, *supra note 10, at 298*.

for a wage" or "a member of the working class."[14] The American Heritage Dictionary defines worker as one who "does manual or industrial labor" or a "member of the working class."[15] Thus defined, the term clearly excludes management employees. When Karl Marx called upon the workers of the world to unite he was not speaking to management. The United Steel *Workers*, the United Automobile *Workers*, the United Mine *Workers* are organizations of working men and women not management. When, in the hearings on the Act, the representative of the American Bar Association suggested the exemption because the Act was not intended to refer to "labor disputes"[16] he was referring to disputes between management and workers, not executives. The opposition to the FAA which gave rise to the exemption came from the American Federation of Labor, an organization representing workers, not management.

Concededly there are alternative definitions that would include all employees. But such a reading would, as the Seventh Circuit has said, "give the exclusion a breathtaking scope. It would mean that an arbitration clause in an employment contract between a giant multi-national corporation and its chief executive officer would, although plausibly 'involving' interstate commerce within the meaning of Section 2, not be enforceable in federal court." [17] The Seventh Circuit concluded that to avoid that result the exemption should be read to cover only those involved in transportation. More sensibly it should be

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[14] Webster's Third New International Dictionary (1981) 2364.

[15] The American Heritage Dictionary of the English Language (3d ed. 1996) 2057.

[16] "It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." W.H. Pratt testimony reported at Finkin, *supra* n. 10, at 285.

[17] *Pryner v. Tractor Supply Co.*, 109 F. 3d 354, 358, *cert denied*, 522 U.S. 912 (1957).

read, as it says, to apply to workers in the sense we have described. So reading it would exclude executives and other management employees.[18]

The only appellate decision that we know of agrees. In *Bernhardt v. Polygraphic Co.*, 218 F.2d 948 (2d Cir. 1955) the Second Circuit held that the arbitration provision in the contract of employment of a superintendent of a plant was enforceable under the FAA. After holding that the provision for a stay pending arbitration in Section 3 of the Act was independent of the commerce requirement in Section 2, the court went on to hold that the exemption in Section 1 was inapplicable. The reason: "Plaintiff was not hired as a 'worker' but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of 'workers.'" [19]

The exclusion from the exemption of management employees' contracts, is significant. It helps to draw a line between the two kinds of arbitration agreements we have described. Most American workers do not enter into individual negotia-

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[18] Careful definition of "workers" is not required in this case. The plaintiff, Saint Clair Adams, is clearly a member of the working class. If definition is needed in other cases recourse can be had to decisions under the National Labor Relations Act. That Act contained a broad definition of employee but the National Labor Relations Board and this Court concluded that given the structure of the statute it made no sense to include managerial employees in the protections given to employees by the Act, and there is a substantial body of authority delineating the distinction. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The exemption should include employees held to be protected by the NLRA under *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947) prior to the 1947 exclusion of supervisors since foremen are not normally able to negotiate the terms of their employment.

[19] 218 F.2d at 951-952. This Court reversed on the commerce question, holding that in the absence of an allegation that the superintendent was engaged in commerce the FAA was inapplicable and state law governed. 355 U.S. 198 (1956). The Court did not, therefore, address the exemption question.

tions as to the terms and conditions of their employment. Indeed, the only historical parallel to the type of individual agreement involved in this case is the "yellow dog" contract: An agreement that specified nothing about wages or hours or provided any protection against discharge but only contained one term: the agreement not to join a union. In this sense the arbitration agreement involved in this case is the "yellow dog" contract of the 90's. Congress, in making yellow dog contracts unenforceable, declared in Section 2 of the Norris La Guardia Act that "the individual unorganized *worker* is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor."[20] (Emphasis added.) Just so, and for the same reason, seven years earlier it exempted workers' contracts, and only workers contracts, from the FAA.

Unlike workers, executives and other management employees typically do negotiate employment contracts specifying a salary and a term, as well as other matters, and they may include an arbitration provision. Paying attention to the requirement of Section 1 of the exemption that the excluded employment contract be a contract by a worker, therefore, serves as a method for distinguishing the arbitration agreements of those who are "helpless to exercise actual liberty of contract" from the agreement of those, who, by and large, are not.[21]

The Ninth Circuit did not address the question of whether the respondent in this case was a "worker." But the record in this case clearly shows that he was. He was a clerk in a retail store. He was not the kind of employee involved in the *Gilmer* case. Robert Gilmer was not a "worker" but a Manager of Financial

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[20] 29 U.S.C. § 102

[21] The distinction is, we concede, not perfect. Many lower level managerial employees may have little real choice as to whether to agrree to arbitration and some workers, particularly in the entertainment industry, have real negotiating power. The distinction nevertheless substantially accomplishes the goal. The best is the enemy of good, as Voltaire said.

Services. He was, as the Court took pains to describe him, an "experienced business man." [22] He was, in short, a management employee and as such not within the exemption of Section 1 of the FAA even though engaged in an industry affecting commerce. If we ignore for the moment what the Court itself ignored — that if he was to function as a broker federal law required him to register with the New York Stock Exchange and the Exchange required him to agree to arbitration, a situation which no longer exists[23] — he was the kind of employee who was in a position to refuse to agree to waive his right to judicial enforcement of his statutory rights. Although he was engaged in an industry affecting commerce, he was not a "worker" and therefore not within the exemption.

III. THE EXEMPTION APPLIES ONLY TO CONTRACTS OF EMPLOYMENT AND DOES NOT EXCLUDE FROM ENFORCEMENT ALL WORKERS' AGREEMENTS TO ARBITRATE

We agree with the Ninth Circuit that the agreement in this case is a contract of employment because it was imposed as a condition of gaining employment and dealt with employment matters, a question in any event not open for argument given the limited grant of certiorari. But it is important to emphasize that if the exemption to Section 1 is construed as we suggest it would apply only to the agreements to arbitrate contained in contracts of employment. Workers' agreements to arbitrate are not exempt from enforcement by Section 1 unless they are contained in a contract of employment. Certainly, a worker's agreement to arbitrate a dispute that has already arisen is not exempted. It is an agreement to arbitrate a dispute, not a contract of employment. Nor, in our view, would even a mandatory con-

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[22] 500 U.S. at 33.

[23] See the brief amicus curiae of the Securities Industry Association in support of petitioner at pp. 16-18.

tract of employment that provided an alternative dispute mechanism for future disputes and provided for arbitration at the option of the worker be exempt. In such a case the agreement to arbitrate would be the exercise of the option. The contract of employment embodying the option would not in itself be the effective arbitration agreement; the agreement to arbitrate is not formed until the employee accepts the option's continuing offer.

Finally, it is not at all clear that a collective bargaining agreement is a contract of employment. That issue is not before the court but the Ninth Circuit in *Craft v. Campbell Soup Co.*, 177 F.3rd 1083, in which it set out the reasoning on which the judgment in this case rests, assumed without discussion that the collective agreement in that case constituted a contract of employment bringing the exemption in Section 1 into play. That assumption is not necessarily correct. As this Court said in *J.I. Case Co. v. National Relations Board*, 321 U.S. 332, 334 (1944):

> Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to the terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to an individual ordinarily comes into existence from it alone. . . .[24]

IV. THE NINTH CIRCUIT'S DECISION REMITS THE ENFORCEMENT QUESTION IN THIS CASE TO THE CALIFORNIA COURTS

The procedural posture of this case illustrates the limitations of the Ninth Circuit's decision. Respondent Adams, a California resident, filed suit in a California state court claiming a violation of a California statute, the California Fair Employment and Housing Act. The defendants were California residents and Circuit City Stores, Inc. an out-of-state corporation. The defendant corporation did not attempt to require arbitration of the state law claim in the California court. Nor did it remove the suit to federal court.[25] The suit remains pending in the California court. Instead, relying on diversity of citizenship, it initiated this case, a separate proceeding against Adams under Section 4 of the FAA to require him to arbitrate his state law claim and to enjoin the state court proceeding pending arbitration.

[24] 321 U.S. 332, 334-335 (1944).

This case is similar in some respect to *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1955). There the question was whether the FAA was inapplicable because of the absence of an allegation of interstate commerce; here it is whether it is inapplicable because of the exemption. When this Court found the Act inapplicable in *Bernhardt* it went on to hold that *Erie R.R. v. Tompkins, 304 U.S. 64 (1938)* required that state law governed as to the enforceability of a pre-dispute arbitration agreement and concluded that under Vermont law the arbitration agreement was unenforceable.

In this case reference to state law would produce the same result. Under California law Circuit City Stores' particular arbitration agreement is unenforceable as an unconscionable contract of adhesion. *Ramirez v. Circuit City Stores, Inc.*, 90 Cal Rptr. 2d 916 (Ct. App. 1999) *rev. deferred*, 94 Cal Rptr. 2d 1, 995 P. 2d 137 (Sup. Ct. 2000); *Armendariz v. Foundation Health Psychcare*, 83 FEPC Cases (BNA) 1172, __ P. 2d. __ (Ca. 2000). But, unlike *Bernhardt*, this Court cannot rest its decision on state law. If the Ninth Circuit's decision as to the scope of the exemption is sustained Section 4 of the FAA is inapplicable and there is no basis for this proceeding.[26] The facts

[25] It could not in the absence of complete diversity in the California suit.

[26] If, on the other hand, the Ninth Circuit is reversed then a decision must be made as to the enforceability of Circuit City Stores' arbitration agreement under California law.

of this case thus vividly demonstrate that the decision of the Ninth Circuit does not, in and of itself, render all workers agreements to arbitrate state statutory claims unenforceable; it simply leaves the question open for decision by the California courts.

This is an entirely justifiable result. There is no reason why federal law should intervene to prevent the California courts from determining whether a California agreement to arbitrate should preclude judicial enforcement of a California statute. True, this court in *Southland Corp v. Keating*, 465 U.S. 1 (1984), over vigorous dissent, found that the Federal Arbitration Act had precisely this effect. But that case, as well as *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), did not involve the labor exemption. If the exemption applies state law will determine if a worker's pre-dispute agreement to arbitrate can bar judicial enforcement of his state law claim. Only in suits brought to enforce federal law brought in, or removed to, federal court will the Ninth Circuit's reading of the exemption result in non-enforcement.

CONCLUSION

The National Academy of Arbitrators supports arbitration as a voluntary method of resolving disputes, whether those disputes be as to the meaning and application of the terms of a collective agreement or of a statute. But arbitration is desirable, we believe, only if it is freely and knowingly agreed to. This is particularly true when statutory protection of workers' rights is involved. This Court made a major advance in that direction with respect to unionized workers in *Wright v. Universal Maritime Service, Inc.*, 525 U.S. 70 (1998). It held, as the Academy urged in its amicus brief in that case, that a collective agreement should not be construed as waiving a worker's right to a judicial forum for claims of employment discrimination unless that waiver was clear and unmistakable. The Court can now provide the same protection for unrepresented workers by accepting the

Ninth Circuit's reading of the commerce requirement in the exemption in Section 1 of the FAA. Such a reading makes sense of the exemption, is in accord with its genesis, and would support rather than diminish the status of arbitration as an alternative dispute mechanism.

We agree that alternative disputes resolution programs providing in-house informal procedures for resolving disputes, including those involving statutory rights, are desirable for both management and workers. Arbitration as the final step in such procedures is certainly appropriate. But, we submit, unilaterally foisting it upon workers who have no real option to accept or reject it is good neither for workers nor the arbitration process. The exemption in Section 1 of the Federal Arbitration Act should therefore be construed as we have suggested and the judgement of the Ninth Circuit should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL WORKRIGHTS INSTITUTE IN SUPPORT OF RESPONDENT SAINT CLAIR ADAMS

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INTEREST OF *AMICUS CURIAE*

The National Workrights Institute is a not for profit research and advocacy organization focused exclusively on issues of the workplace and employee rights. Prior to becoming an independent organization, the Institute was the National Taskforce on Civil Liberties in the Workplace for the American Civil Liberties Union from 1988-1999.

The Institute has long been a leader in the development of employment disputes arbitration. We believe that arbitration holds the promise of making workplace justice available to workers for the first time in our history, and that the growth of employment arbitration should be encouraged. We also believe that arbitration will only fulfill that promise if it is voluntary and fair. Institute president Lewis Maltby's 1994 article in the New York Law School Journal of Human Rights was the first major publication to advocate this position. Since that time, Maltby served as an active member of the American Bar Association's National Taskforce on Employment Arbitration, which drafted the ADR due process protocol which has become the national standard for arbitral fairness. Maltby also testified before the Dunlop Commission regarding ADR, and served as an advisor to the Commission at the request of Chairman Dunlop. Maltby is a member of the Board of Directors of the American Arbitration Association, and serves as co-chair of its advisory council on employment issues. His most recent publication on ADR in the Columbia Journal of Human Rights has been cited in many judicial opinions and by several parties and amici in this case.[1]

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[1] The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of

(continued...)

INTRODUCTION

Arbitration of employment disputes outside the unionized sector has grown at a remarkable rate. Traditionally, this practice was virtually unknown. In 1979, less than 2% of employers used arbitration.[2] By 1997, 19% of non-union employers were using arbitration for employment disputes.[3] Because arbitration is much less expensive than litigation, it has the potential to bring real access to workplace justice to rank and file employees for the first time. However, there has been very little legal protection for the rights of employees, and most employees have little or no bargaining power. The result has been that most employment systems are not fair to employees. Agreements to arbitrate are not voluntary. They are virtually always a condition of employment. And, with rare exceptions, due process is generally lacking. The National Workrights Institute urges the court not to extend the Federal Arbitration Act to employment disputes under these circumstances.

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[1] (...continued)
the attached brief has been authored by counsel for either party or any other entity. No persons other than the Amicus Curiae, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] Bureau of National Affairs, Personnel Policies Forum Survey No. 125, Policies for Unorganized Employees (Apr. 1979).

[3] U.S. General Accounting Office, Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997).

SUMMARY OF ARGUMENT

The federal policy in favor of arbitration is both a Congressional and a judicial policy. Congress' intent in adopting the Federal Arbitration Act was not to increase the use of arbitration for its own sake, but to do so to improve the quality of justice in America. The judicial policy is also rooted in concern for justice. Because employment arbitration is almost never voluntary, and generally fails to provide due process, it would be inconsistent with both Congressional and judicial policy to extend the FAA into employment agreements.

ARGUMENT

I. Congress' Intent in Enacting the Federal Arbitration Act was Both to Eliminate Arbitrary Barriers to the Enforcement of Arbitration Agreements and To Improve the Quality of Justice. The Court Should Consider Both of these Congressional Goals in Deciding Whether the FAA Applies to Contracts of Employment.

Whether the Federal Arbitration Act applies to contracts of employment cannot be entirely determined by the statutory text, or even by the legislative history. The Court must also consider the practical consequences of this decision, and how those consequences relate to the underlying purpose of the FAA and the federal policy in favor of arbitration.

If the statutory text is clear and unambiguous, then the analysis need go no further. The plain meaning of the statute controls and no analysis of legislative history is needed. This, however, is not such a case. As the briefs of the parties amply demonstrate, the meaning of the applicable statutory text is anything but clear. In such a case, analyzing the legislative history is essential.

The immediate purpose of Congress when it enacted the FAA was to eliminate the presumption that arbitration was inferior to litigation as a method of dispute resolution, and to place arbitration on an equal footing with court procedures. Congress concluded that the quality of justice in America would be improved if barriers to the use of voluntary arbitration were eliminated.

This policy has proven to be sound with regards to commercial arbitration. Individuals and organizations with disputes to resolve have increasingly turned to arbitration in recent years. For example, the caseload of the American Arbitration Association more than doubled (from 60,808 to 140,188) from 1991-1999.[4] This growth did not take place because people were forced to turn to AAA. It occurred because people who used arbitration generally found it to be a fair and efficient method of resolving complaints.

Most lower federal courts have held that the federal policy in favor of arbitration is so strong that the FAA must be read to apply to employment arbitration. Other parties and amici have engaged in deep analysis of the legislative history to find Congress' intent regarding employment agreements, and the National Workrights Institute has little or nothing to add to the debate on this point.

However, the debate about Congress' specific intent regarding employment contracts should not exclude consideration of Congress' general intent. Congress believed that the administration of justice in the United States would be improved if artificial restrictions upon the use of arbitration were eliminated. Congress was

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[4] American Arbitration Association, Annual Report 2000.

not in favor of arbitration for its own sake. Arbitration was not an end in itself. Congress encouraged the expanded use of arbitration as a means to achieving the end of improving justice.

Congress' intent to use expanded arbitration, not as an end in itself, but as a means to improve the quality of justice in America can be seen in the Judiciary Committee reports from both the Senate and the House of Representatives. The Senate report, for example, opens with the concern that existing law at that time left the "party aggrieved—without adequate remedy".[5] The report goes on to characterize the existing law holding arbitration agreements unenforceable as "no longer—founded in reason or justice".[6] The report closes by stating that the results of the Arbitration Society of America (now the American Arbitration Association) in resolving disputes between businesses show "not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes".[7]

The same concern with the effect of arbitration on the quality of justice appears in the report of the House Judiciary Committee. The report refers to the existing judicial rule against arbitration as an "anachronism" and criticizes "the injustice which results from it".[8] The final paragraph of the report refers to the "obvious justice" of eliminating irrational barriers to arbitration.[9]

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[5] Report of the Senate Judiciary Committee, Report No. 536, 68th Congress, 1st session, May 14, 1924, page 2.

[6] Senate Judiciary Committee Report, supra, page 3.

[7] *Id.* at 3.

[8] Report of the House Judiciary Committee, Report No. 96, 68th Congress, 1st session, January 24, 1924, pages 1-2.

[9] *Id.* at 2.

It is true that these statements are short and come with little explanation. They offer little specific guidance as to what Congress considered justice in the context of arbitration. However, they clearly demonstrate that Congress was concerned about the quality of justice, and enacted the FAA because it believed that expanding the availability of arbitration would produce justice.[10]

Whether justice will actually be advanced by applying the FAA to employment agreements can best be judged by examining the actual state of employment arbitration today.

One critical dimension in assessing the quality of employment arbitration today is whether it is voluntary. Neutral experts, the academic literature, and the dispute resolution industry all agree that arbitration should be freely chosen by both the parties and that arbitration should not be forced upon people who would rather resolve their dispute by other means. The American Arbitration Association, the world's oldest and largest dispute resolution organization, recommends that arbitration be used only when it has been freely chosen by both parties and suggests that using arbitration not be a condition of employment.[11]

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[10] The significance of the brevity of the statements about improving justice must also be judged by the overall length of the reports. If the reports were long and well developed, the brevity of the remarks about justice could be significant. However, the entire Senate report is only 3½ pages long, and the House report is only 2 pages. When everything in the reports is expressed with such extreme brevity, the fact that Congress' concerns about justice are not developed at length means very little, if anything.

[11] National Rules for the Resolution of Employment Disputes (effective June 1, 1997), American Arbitration Association. The (continued...)

But employment arbitration today is not voluntary. Of the 500 employment arbitration plans administered by the American Arbitration Association, only 2 percent allow the employee to choose whether to use the plan.[12] In the remaining 98%, "agreeing" to use the employer's arbitration system is a condition of employment. Not only do most employers not allow employees to decide whether to arbitrate or litigate after the dispute has arisen (which might create adverse selection issues), they will not even allow employees to make a binding voluntary choice at the time of employment (when all parties would be on an equal footing).

Nor does employment arbitration consistently provide due process. Nothing in the Federal Arbitration Act requires due process. To the contrary, an arbitration decision can only be overturned by the court under four extreme circumstances. These are fraud, partiality or corruption, misconduct by the arbitrator, and the arbitrator exceeding his or her powers.[13] While these are necessary rules, they do not constitute an adequate set of due process protections. Many egregious due process violations would not even arguably require, or even justify, judicial review. For example, if an employer's arbitration rules did not permit the employee to be rep-

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[11] (...continued)
Association will administer arbitration systems that are a condition of employment where the employer is not willing to follow this recommendation if: a. the arbitration plan conforms to AAA due process rules (based upon the ABA Due Process Protocol)and: b. a condition of employment plan is legal in the applicable jurisdiction.

[12] Interview with Robert Meade, Senior Vice President, American Arbitration Association, September 9, 2000.

[13] 9 U.S.C.A. 10.

resented by counsel, there is no violation of the FAA. There has been no fraud. Nor has the arbitrator failed to be impartial or committed any other misconduct. And the arbitrator has not exceeded his or her authority. The same would be true if the employer's arbitration rules prohibited all discovery, or denied the arbitrator the authority to deny statutorily authorized remedies.

These are not oversights. The FAA was designed to prevent violations of due process by the arbitrator. The act assumes that the parties themselves will create rules for the conduct of the arbitration that are fair to both sides. It makes no effort to establish due process standards for the arbitration agreement which the arbitrator must enforce. This may be a reasonable approach when both parties have equal bargaining power, but it is a due process nightmare when one party has the ability to impose a contract of adhesion.

Nor have the courts created due process standards. The lower federal courts have consistently declined the opportunity to condition the enforceability of arbitration agreements upon compliance with due process standards.[14] In many cases, the court declined to require such standards even when there were substantial due process issues in the case at hand. Only in a handful of cases have courts required due process as a condition of enforcing arbitration agreements. The most noteworthy of these cases is *Hooters of America v. Phillips*,[15] in which the fourth circuit refused to enforce an agree-

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[14] See, e.g., *Hurst v. Prudential Securities Inc.*, 21 F.3d 1113 (9th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1994); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991); *Bird v. Shearson Lehman American Express*, 926 F.2d 116 (2nd Cir. 1991).

[15] 173 F.3d. 933 (4th Cir. 1998).

ment to arbitrate which was a condition of employment where the arbitrator had to be selected from a list which was created solely by the employer with no limitations on whom it could select. The employer could deliberately create a list composed entirely of individuals with a conflict of interest because they were economically dependent on it without violating the rules of the plan. But even if such decisions were widespread, and they are not, this offers precious little protection of due process. The due process violation in *Hooters* was so outrageous that it is hard to believe that any employer attempted to get away with it. The fact that the court refused to enforce an agreement to arbitrate involving such a kangaroo court gives little, if any, indication that courts will take issue with other due process violations which are not as blatant.

Indeed, in cases where the facts were less egregious, the courts have generally turned a deaf ear to due process violations in arbitration. In *Woods v. Saturn Distribution Corporation*,[16] the plaintiff, a former Saturn dealer whose franchise had been terminated, was obligated by a non-negotiable clause in his franchise agreement to take his dispute regarding termination to Saturn's arbitration system. The arbitration panel in such cases was composed of two Saturn dealers and two Saturn employees. Despite the fact that all four arbitrators had a conflict of interest due to their ongoing economic relationship with Saturn and all four were economically dependent on Saturn, the 9th Circuit found no due process violation.

In *Dexter v. Prudential Insurance Company of America*,[17] the district court of Kansas faced a situation in

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[16] 78 F.3d 424 (9th Cir. 1996).

[17] 1999 U.S. Dist. LEXIS 3141 (Kansas).

which an arbitrator refused to order the defendant to disclose the sources of the documents it produced in discovery. This severely handicapped the plaintiff's ability to find evidence that might rebut these documents. She was also handicapped in her ability to cross examine witnesses at the hearing because she did not know which documents had been prepared by which witnesses. Worst of all, the failure to disclose prevented her from learning the identities of several defense witnesses prior to the hearing, leading to a trial by surprise. None of these due process issues troubled the court, which denied the motion to vacate the arbitration award.

Not surprisingly, in the absence of legal requirements, employers have not generally provided due process in their employment arbitration systems. When the United States General Accounting Office examined the due process provided by employers it found that the majority did not meet the minimum standards of the American Bar Association's Due Process Protocol for Employment Arbitration.[18] In the words of the GAO, "if expected to conform with all the criteria for fairness recently proposed by the Commission on the Future of Worker-Management Relations, most would not do so."[19]

In addition, it has been established that certain well-known employment arbitration systems have done a very poor job of providing justice. For example, in the security industry's arbitration system (NYSE and

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[18] U.S. General Accounting Office, Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution 7 (1995).

[19] *Id.* at 15. The criteria proposed by the Commission (created by President Clinton and carried out jointly by the Department of Labor and the Department of Commerce) took its criteria for fairness from the ABA Protocol.

NASD) employees with discrimination claims consistently fare much worse than employees who take their discrimination claims to court. When Orrick, Herrington, and Sutcliffe (a large national firm which represents employers) analyzed cases in which employees took their discrimination claims to California state court or federal court, they found that plaintiffs won in 44% of the cases.[20] But when Stuart Bompey examined discrimination claims in the NASD/NYSE arbitration system, he found that employees prevailed only 17.7% of the time.[21] The disparity in punitive damages appears even greater. Employee-plaintiffs in court received punitive damages in 18% of the cases.[22] There is no comparable data for NYSE/NASD employment cases. But when the security industry system's record for punitive damages in 10,000 investor cases was analyzed, it was learned that punitive damages were issued in only 2.1% of all cases.[23] And when Margaret Jacobs of the Wall Street Journal analyzed the 1000 awards issue by NYSE arbitrators in the first six months of 1994 (including, but not limited to, employment cases), she found that punitive damages had been awarded in less than 1% (.4%) of all cases.[24]

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[20] Orrick, Herrington & Sutcliffe, Summary of California Jury Verdicts Study 1-4 (1995).

[21] Stuart Bompey, 19 Employment Relations Law Journal 197 (1994).

[22] Orrick, supra, *id.* at 6.

[23] Joel Liefer, Recent Developments in Arbitration, Mediation, and Other Alternative Dispute Resolution Techniques (Dec. 1996) http://www.seclaw.com/html.

[24] Margaret A. Jacobs, Required Job-Bias Arbitration Stirs Critics, WALL ST. J., June 22, 1994, at B7.

It is true that some employers provide excellent due process. The American Arbitration Association, for example, revised its rules for employment arbitration to conform to the Protocol. AAA will not administer an arbitration unless the employer agrees to allow the Association to use these rules. As a result, the approximately 5 million employees covered by AAA plans receive excellent due process. But, while AAA is the largest arbitration provider, it covers only a small fraction of all employer arbitration. Of the approximately 130 million employees in the American workforce, at least 19% are subject to arbitration agreements.[25] Thus, the American Arbitration Association and its due process rules cover only 20% of those employees who are required to arbitrate their employment disputes. The remaining 80%, some 20 million employees, must arbitrate their disputes without due process protection. Indeed, the Circuit City plan itself does not conform to the Protocol by shortening statutes of limitation and limiting statutory remedies.

Many among the parties and amici favoring applying the FAA to employment agreements cite my 1998 article in the Columbia Human Rights Law Review[26] in support of the assertion that private arbitration provides employee-plaintiffs due process equivalent to that provided by the courts. These parties have misunderstood and misconstrued this article.

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[25] U.S. General Accounting Office, Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997).

[26] Private Justice: Employment Arbitration and Civil Rights, Lewis L. Maltby, Columbia Human Rights Law Review, Vol. 30, Number 1, Fall 1998.

The article found that, based on the available data, employee plaintiffs fare better in arbitration before the American Arbitration Association than they do in litigation. It represents a significant step forward because it compares the experience of the entire class of employee-plaintiffs in arbitration and litigation, not just the subset of each who survived pretrial motions and received a hearing on the merits. It also advances our collective knowledge of the relative results of arbitration and litigation by comparing not just the percentage of employee-plaintiffs who received an award in each system, but by comparing the percentage of aggregate demand received by the two classes of plaintiffs.

However, this work, like any study, rests on methodological assumptions and is no more accurate than the assumptions on which it rests. The methodology for my study contains several assumptions whose accuracy can be debated. The most important of these stems from the data sets used. The data set for litigation is all employment civil rights cases filed in United States District Court in 1994, according to the Inter-University Consortium for Political and Social Research Database.[27] There appears to be no question that data accurately reflects the results of employment civil rights litigation in general.

The data set for arbitration, however, are the results of arbitrations conducted by the American Arbitration Association in civil rights employment disputes from 1993-1995. AAA has long been regarded as the gold standard for employment fairness. It is almost certain that employees who arbitrate their claim with AAA fare better than the entire universe of employees who arbi-

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[27] *Id.* at 46.

trate their claims.[28] Drawing conclusions about the results of employment arbitration as a whole from my study is unwarranted. I make no apology for using this data. There is no data set for the results of employee arbitration as a whole, and researchers have no option but to base their work on the best data which is available. But those who conduct research, and those who use it, must be aware of the research's methodological assumptions, and their implications for the reliability of the conclusion.

The second assumption is that the results of cases which reach a decision on the merits mirror the results of all cases, including the cases which are settled. If employee-plaintiffs' success in settling cases in litigation (relative to arbitration) is not the same as their relative success rate in cases which reach a decision on the merits, it would change the conclusion of my study. This was a necessary assumption, since there is no data on settlement results. But the best one can say about this assumption is that it is plausible.

Thus, my study is properly read to conclude that arbitration is not inherently second class justice, and that a fair arbitration system can and has produced results that compare favorably with litigation. The study does not say that arbitration results in general compare favorably with litigation or that arbitrations conducted outside the AAA provide due process. And the evidence from other sources, such as the GAO strongly indicate that other arbitration providers generally do not meet even minimum due process standards.

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[28] As mentioned in the Statement of Interest, the author is a member of the AAA Board of Directors and co-chair of its national advisory council on employment arbitration.

II. The Federal Policy in Favor of Arbitration is a judicial Policy as Well as a Congressional Policy, and the Court Must Consider Policy Issues in Reaching its Decision.

The federal policy in favor of arbitration is clearly a Congressional policy. But it is also the policy of the federal judiciary. Many commentators have noted that the Court consistently reads the FAA in a broad and generous manner.[29] Even more important, the Court has embraced an expansive view of arbitration even when it was not compelled to do so by the FAA. For example, in *Prima Paint Corp. v. Flood & Conklin Manufacturing*,[30] the Court held that an arbitration clause is analytically separable from the rest of the contract, rendering the agreement arbitrable even though it was procured by fraud. This result was undoubtedly consistent with Congressional policy favoring arbitration, but it was by no means compelled by the FAA. The Court would clearly have been within its rights to rule that where a contract has been procured by fraud, the entire contract is void. This is the general rule and nothing in the FAA requires a different result. This does not suggest that the Court's decision was wrong. But it does demonstrate that the Court made its own policy judgment in favor of arbitration.

The same is true of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[31] The Court in *Cone* held that the district court abused its discretion by ordering a stay in arbitration pending the outcome of state liti-

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[29] Michael R. Holden, Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law, 80 Cornell L. Rev. 1695 (1995).

[30] 388 U.S. 395 (1966).

[31] 460 U.S. 1 (1982).

gation. The Court did not base this ruling upon the Federal Arbitration Act. The ruling was based on the Court's own rules for deference to pending state procedures established in *Colorado River Water Conservation District v. United States*.[32] Again, the Court ruled in favor of expanding the reach of arbitration on its own initiative and authority in a case where it clearly recognized that its decision was not controlled by the FAA.

This not to say that the judicial policy should overshadow the Congressional policy, merely that there is an independent judicial policy favoring arbitration. To the extent that the Court is establishing its own policy, it must consider policy arguments, most importantly whether expanding the scope of arbitration will improve or reduce the quality of justice.

As described in Section I, employment arbitration today is virtually never voluntary and generally fails to provide due process. Extending the Federal Arbitration Act to employment agreements under these circumstances would not improve our justice system, but make it worse. Judicial policy on arbitration should reject this course.

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[32] 424 U.S. 800 (1976).

CONCLUSION

Employment arbitration holds the promise of making workplace justice truly available for the average employee. But it will only fulfill that promise if it is voluntary and fair. Employment arbitration that is a condition of employment and fails to provide due process is not justice. At present, employment arbitration in America is almost never voluntary and it generally fails to provide due process. Extending the Federal Arbitration Act to employment arbitration under these circumstances would violate Congress' intent that arbitration be encouraged where it would increase justice. It would also be an unwise application of judicial policy on arbitration. For the foregoing reasons, the judgment of the Ninth Circuit should be sustained.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent individual plaintiffs in civil actions, including employees seeking to vindicate their rights against discrimination in the workplace under federal and state civil rights statutes.

In ATLA's view, arbitration of existing claims may offer an effective and efficient means of dispute resolution for both employee and employer. Such post-dispute agreements to arbitrate depend upon a knowing and voluntary waiver of the right of access to the courts and the right to a trial by jury.

By demanding as a condition of employment that the employee prospectively waive these rights prior to any dispute, however, employers undermine both the constitutional and statutory rights of employees. The plain text of the Federal Arbitration Act indicates that Congress did not intend such a result.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit can be affirmed on a ground substantially narrower than that relied on by the court of appeals. It is not necessary in this case to decide whether the exemption in section 1 of the Federal Arbitration Act applies to *all* employees. At the least the phrase "engaged in . . . interstate commerce" is as broad as its usual meaning, which encompasses the entire stream of interstate commerce, from the production of goods and services for that commerce through their final distribution.

The phrase "engaged in commerce" is used in a large number of federal statutes, and has been consistently interpreted to include the stream of interstate commerce from initial production through distribution. The Clayton Act, originally adopted in 1914 and expressly limited to firms engaged in commerce, has long been construed to apply to "the flow of interstate commerce -- the practical, economic

continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *United States v. American Bldg. Maint. Industries*, 422 U.S. 271, 276 (1975). Prior to the 1925 enactment of the Federal Arbitration Act, this Court had repeatedly applied the Clayton Act to defendants which were not part of the transportation industry. *E.g. Federal Trade Commission v. Sinclair Refining Co.*, 261 U.S. 463 (1923).

The principle of ejusdem generis is only invoked to clarify the meaning of ambiguous language. Petitioner itself describes the phrase "engaged in commerce", when used in the Robinson-Patman Act, as "clear language."

Under ejusdem generis, if an enumeration is followed by a general term, the only limitation which can be imposed on the general term is some characteristic common to *all* of the items mentioned in the enumeration. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). Petitioner urges that "workers engaged in . . . commerce" should be limited to workers who move goods between states, or to workers in a transportation industry. But many seamen and railroad employees would not meet that requirement. Seamen on fishing boats, for example, are not in a transportation industry and do not usually move goods from one state to another; rather, they engage in interstate commerce by generating goods that are later sold in an interstate market.

Petitioner Circuit City, a large national retailer of electronics goods, is clearly "engaged in commerce" within the meaning of the Clayton Act. The section 1 exemption of the FAA extends to the "class" of all employees who work for such an employer.

ARGUMENT

THE EXEMPTION IN SECTION 1 OF THE FEDERAL ARBITRATION ACT APPLIES, AT THE LEAST, TO EMPLOYEES OF FIRMS THAT ENGAGE IN THE PRODUCTION, TRANSPORTATION OR DISTRIBUTION OF GOODS OR SERVICES IN INTERSTATE MARKETS

Both the Ninth Circuit and petitioner misapprehend the nature of the question posed by this case, and by the terms of section 1 of the Federal Arbitration Act. In the court of appeals' seminal decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), it expressly assumed that the phrase "workers engaged in foreign or interstate commerce" could only have one of two possible meanings. That statutory limitation, it asserted, either must include all employees or must be narrowly limited to only those employees "who actually transport people or goods in interstate commerce." 177 F.3d at 1085. Petitioner also insists that these are the only two possible interpretations of section 1. (Pet. Br. 22, 24).

There is, however, a third possibility -- that the phrase "engaged in commerce" has its normal meaning, and encompasses the production and distribution -- as well as the transportation -- of any goods or services that pass through interstate commerce. If the phrase has at least that scope, that is sufficient to resolve the instant case.[2]

[2] Such a resolution of the instant case would leave unresolved the question of whether the section 1 exemption also applies to employees of employers whose businesses merely affect interstate commerce.

I. THE PHRASE "ENGAGED IN COMMERCE" IS GENERALLY UNDERSTOOD TO ENCOMPASS THE PRODUCTION AND DISTRIBUTION AS WELL AS THE TRANSPORTATION OF GOODS OR SERVICES IN AN INTERSTATE MARKET

The exemption in section 1 of the Federal Arbitration Act applies to any "class of workers engaged in foreign or interstate commerce." The phrase "engaged in commerce" is a common one in federal statutes; several dozen other federal laws, some of which had been enacted prior to the Federal Arbitration Act in 1925, use identical language. See Appendix A. There are hundreds of federal statutes using the phrase "in commerce", including a number of criminal provisions.[3] Neither "engaged in commerce" nor "in commerce" has been generally understood, in these other federal statutes, to be limited to the physical movement of goods or people in interstate commerce; to the contrary, these laws have been construed to apply to the entire stream of commerce, from the production of goods or services which pass though interstate channels until their distribution. Section 1 should be interpreted at least that broadly.

The two most frequently applied statutes regarding persons "engaged in commerce" are the Clayton Act, first enacted in 1914, and the Robinson-Patman Act of 1936. Both statutes forbid a number of actual or potentially anti-competitive practices, and both are limited in their application to firms "engaged in" commerce. 15 U.S.C. §§13-18a (Clayton Act); 15 U.S.C. §§13-27 (Robinson-Patman Act). Both statutes have uniformly been understood to apply to any firm engaged in interstate transactions, not merely to those companies which are involved in the actual transportation of goods or people.

[3] Petitioner correctly notes that the phrases "engaged in commerce" and "in commerce" have generally been given the same construction. (Pet. Br. 14, 15 n.6).

In *United States v. American Bldg. Maint. Industries*, 422 U.S. 271 (1975), this Court reiterated the long established understanding that the Clayton Act applies to "the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution *to the consumer*." 422 U.S. at 276 *quoting Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)(Emphasis added). The actual interstate transportation of goods is only a small portion of the range of activities covered by the Clayton Act. Among the numerous applications of the Act by this Court and lower courts, the amount of litigation by or against transportation companies is insignificant.

The Robinson-Patman Act, also limited to businesses engaged in commerce, has been construed in the same manner. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 195. Petitioner itself describes *Gulf Oil* as reflecting "four decades of near-uniform appellate law reading 'engaged in commerce'" and as reiterating a construction that was "according to its ordinary . . . meaning." (Pet. Br. 31.)

This Court has applied other similarly phrased statutes in the same manner. The Lanham Act was expressly adopted "to protect persons engaged in commerce against unfair competition." 15 U.S.C. §1127. This Court applied that statute to a trade dress dispute between competing Texas fast food restaurant chains in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). Similarly, in *United States v. Robertson*, 514 U.S. 669 (1995), the Court concluded that the defendant had "engaged in commerce," and thus was subject to the prohibitions of RICO, because he had purchased equipment for a mine from out of state sources. 514 U.S. at 671.

In 1925, when the Federal Arbitration Act was adopted, this interpretation of "engaged in commerce" was so well established that its routine application drew little comment. Prior to that year this Court had applied to firms that engaged in interstate sales (but did not operate interstate

transportation systems) both the Clayton Act and a provision of the Federal Trade Commission Act authorizing investigations of firms "engaged in commerce." *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924)(Federal Trade Commission Act); *Federal Trade Commission v. Sinclair Refining Co*, 261 U.S. 463 (1923)(Clayton Act); *Federal Trade Commission v. Curtis Pub. Co.*, 260 U.S. 568 (1923)(Clayton Act); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922)(Clayton Act).

The other federal laws whose application is limited to persons engaged in commerce cover a wide range of subjects, including securities, credit practices, electronic funds transfers, gifts to federal officials, transfers of energy technology, and limitations on foreign acquisitions of American firms. See Appendix A. The variety of the hundreds of federal statutes regarding firms or actions "in commerce" is virtually unlimited. Petitioner does not seriously suggest that all, or any, of these laws have been, or should now be, interpreted to apply only to the actual operation between states of trains, airplanes, trucks and boats.

This Court has generally used the phrase "engaged in commerce" in this manner. For example, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997), the Court observed, "Even though petitioner's camp does not make a profit, it unquestionably engaged in commerce, not only as a purchaser, . . . but also as a provider of goods and services." 520 U.S. at 573.

Had Congress wanted to limit the exemption in section 1 of the FAA to employees of transportation firms, it certainly would have done so specifically. As we set out in Appendix B, Congress has expressly framed a large number of statutes to apply only to interstate "transportation" or only to "common carriers" engaged in commerce. Respondent urges that section 1 be construed as if it read "workers engaged in interstate transportation" or "employees of common carriers engaged in

interstate commerce." But Congress, which has repeatedly utilized just such terminology, deliberately chose not to do so here.

Petitioner relies on a series of pre-1925 decisions of this Court which limited the application of the Federal Employers Liability Act to employees whose interstate activities involved the transportation of goods and people. (Pet. Br. 18). Petitioner suggests that the limitation of the FELA to transportation activities grew out of an interpretation of the phrase "engaged in commerce" in the FELA. (Pet. Br. 18, 21). That is clearly incorrect. The FELA contained an express limitation that confined its reach to transportation; it applied only to "common carrier[s] by railroad." 35 Stat. 65. The FELA was inapplicable to other types of interstate commercial activity because of this restrictive language, not because this Court believed that "engaged in interstate commerce" *meant* "engaged in interstate transportation." This Court's pre-1925 application of the Clayton Act makes clear its understanding, and that of Congress, that the phrase "engaged in commerce" was not limited in this manner.

Petitioner Circuit City is unquestionably engaged in commerce. It operates 518 stores throughout the United States, and sells goods directly on its website. (www.circuitcity.com). Circuit City buys from manufacturers and wholesalers throughout the nation, and certainly receives and distributes most of its goods across state lines. Many of the electronic items sold by petitioner were undoubtedly manufactured, in whole or in part, in foreign countries. In any one state, even California, only a small fraction of the goods sold by a given store will have been made within that state. There is no question that Circuit City itself would, for these reasons, be subject, for example, to the provisions of the Clayton Act, the Robinson-Patman Act, and other laws applicable only to firms engaged in interstate commerce.

Employees of a firm engaged in interstate commerce are ipso facto within the scope of the exemption in section 1 of

the FAA. The statute neither authorizes nor contemplates individualized evaluations of the particular duties of each specific worker. In this regard it differs sharply, and deliberately, from the FELA, which applied to a railroad worker only "*while* he is employed by such carrier in such commerce." 35 Stat. 65 (Emphasis added). Under the FELA, coverage of an employee could literally vary from moment to moment, depending on what task a worker was doing. *E.g. Shanks v. Del. Lackawanna, & W.R.R. Co.*, 239 U.S. 556, 558 (1916); *Illinois Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 478 (1914). Section 1 of the FAA, on the other hand, turns neither on a worker's tasks at any point in time, nor on an individualized assessment of the overall duties of the particular worker in question. Rather, the statutory test is whether the "*class* of workers" to which an employee belongs engages in commerce. The first illustration provided by the statute of a "class of workers" is "railroad employees", a phrase that would encompass *all* the employees of a railroad engaged in commerce. Similarly, where any other employer is engaged in commerce, as that phrase is generally understood, all of its workers fall within the scope of the section 1 exemption.

II. THE RULES OF STATUTORY CONSTRUCTION DO NOT WARRANT A NARROWER CONSTRUCTION OF SECTION 1

Petitioner expressly insists, as it must, that the section 1 exemption does *not* apply to "all workers 'engaged in interstate or foreign commerce'." (Pet. Br. 23). It contends, rather, that rules of statutory construction compel the conclusion that Congress actually meant to depart from the normal meaning of "engaged in commerce" and to exclude from the exemption the vast majority of workers engaged in interstate commerce. No principles of interpretation, however, require such an extraordinary limitation.

Petitioner's argument misapprehends the scope and force of the ejusdem generis doctrine. Petitioner believes that in *every* case in which a general term is preceded by a more specific list, the list *must* be deemed to contain a covert limitation of some sort, and that the general term can *never* be given its ordinary meaning. (Pet. Br. 8, 23 n. 11). That is not the law.

This Court has never applied ejusdem generis in this extreme or mechanical manner. To the contrary, since 1950 this Court has in fact rejected arguments based on ejusdem generis in virtually very case in which they have been raised.[4]

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[4] *West v. Gibson*, 527 U.S. 212, 225 (1999) (ejusdem generis invoked in dissenting opinion); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 408 (1999) (ejusdem generis invoked in dissenting opinion); *United States v. Wells*, 519 U.S. 482, 490 n.9 (1997) (ejusdem generis argument rejected in majority opinion); *id.* at 512 (ejusdem generis invoked in dissenting opinion); *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 720 (1995) (ejusdem generis invoked in dissenting opinion); *Holder v. Hall*, 512 U.S. 874, 917 (1994) (ejusdem generis invoked in concurring opinion regarding an interpretation of the statute not accepted by majority); *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 727-28 (1994) (ejusdem generis invoked in dissenting opinion); *Peretz v. United States*, 501 U.S. 923, 955 (1991) (ejusdem generis invoked in dissenting opinion); *Norfolk and Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) (ejusdem generis argument rejected by majority opinion); *id.* at 136 (ejusdem generis invoked by dissenting opinion); *United States v. Turkette*, 452 U.S. 576, 581 (1981); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980); *United States v. Powell*, 423 U.S. 87, 91 (1975); *United States v. Feola*, 420 U.S. 671, 708 (1975) (dissenting opinion); *United States v. District Court*, 401 U.S. 520, 524 (1971); *United States v. Standard Oil*, 384 U.S. 224, 228 (1966); *King v. United States*, 379 U.S. 329, 336-37 (1964); *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 88 (1964); *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 495 n. 15 (1958); *United States v. Alpers*, 338 U.S. 680, 683 (1950).

The only decision of this Court in the last fifty years which relied on ejusdem generis to limit the meaning of a general term appears to be *Hughey v. United States*, 495 U.S. 411, 418 (1990).

This Court's decisions recognize that when Congress uses a general term preceded by a more specific list, it often means to do no more than recite common or important examples of the types of things which were indeed within the ordinary meaning of that general term.

This Court has repeatedly held that ejusdem generis cannot be invoked unless the general term at issue is inherently ambiguous. "The rule of *ejusdem generis* . . . is only an instrumentality for ascertaining the correct meaning of a word when there is uncertainty." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980), quoting *United States v. Powell*, 423 U.S. 87, 91 (1975), quoting *Gooch v. United States*, 297 U.S. 125, 128 (1936).[5] In *Hughey v. United States*, 495 U.S. 411, 417 (1990), one of the few actual applications of ejusdem generis, the statute in question authorized consideration in restitution orders of certain specified considerations and "such other factors as the court deems appropriate."[6] Petitioner does not suggest that the phrase "engaged in commerce" is inherently ambiguous.[7] To the contrary, petitioner describes

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[5] *Garcia v. United States*, 469 U.S. 70, 74 (1984); *United States v. Turkette*, 452 U.S. 576, 581 (1981); *United States v. Alpers*, 338 U.S. 680, 683 (1950).

[6] Petitioner cites as the paradigm of a case calling for application of ejusdem generis an enumeration followed by the phrase "and other things." (Pet. Br. 20 n. 10).

[7] Quite arguably the phrase may be ambiguous in the sense that it may refer to *more* than just the production, movement, and distribution of goods in interstate commerce. *Craft v. Campbell Soup Co.*, 177 F. 3d 1083, 1085 (9th Cir. 1999). In the era when the Federal Arbitration Act was adopted, even this Court used the phrase "engaged in commerce" as if it were the same as involving or affecting commerce. E.g. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436 (1920). But the possibility that "engaged in commerce" might have such a broader meaning cannot justify utilizing ejusdem generis to give the phrase a narrower meaning.

the phrase "engaged in interstate commerce", when utilized in the Robinson-Patman Act, as "clear language." (Pet. Br. 31). If it were indeed unclear whether "engaged in commerce" or "in commerce" referred to anything other than the actual transportation of goods and people between states, that would raise serious constitutional problems for the numerous criminal provisions that utilize those phrases.

This Court has also observed that the use of ejusdem generis is particularly inappropriate where the general term in question is preceded by the adjective "any". In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), this Court rejected the contention that "any other final action" by an agency referred only to final action after notice and an opportunity for a hearing.

> When Congress amended the provision in 1977, it expanded its ambit to include not only "other final action," but "*any* other final action." This expansive language offers no indication that Congress intended the limiting construction . . . that the respondents now urge.

Harrison v. PPG Industries, Inc., 446 at 588-89 (Emphasis in original). The exemption in section 1 of the FAA applies to "*any* other class of workers engaged in foreign or interstate commerce." (Emphasis added). *See Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991)(general phrase referring to "*all* other law" (emphasis added) "means what it says.")

Any application of ejusdem generis must, at the least, meet one essential requirement--any restriction deemed to derive from the enumeration must, of course, be satisfied by every item in the enumeration itself. As petitioner itself recognizes, the limitation has to be some element "common" to every situation encompassed by the enumeration. In

Harrison v. PPG Industries, Inc., for example, the respondent sought to read into the general phrase "final action" a requirement that that action have been preceded by notice and an opportunity for a hearing. In rejecting that contention, this Court explained:

> The flaw in this argument is that at least one of the specifically enumerated provisions . . . does not require the Administrator to act only after notice and opportunity for hearing. . . . Thus, even if the rule of *ejusdem generis* were applied, it would not significantly narrow the ambit of "any other final action" . . .

446 U.S. at 589.

Petitioner offers two formulations of the restriction which it seeks to draw from the enumeration in section 1 of the FAA -- (1) persons "who are actually engaged in the movement of goods in interstate commerce" (Pet. Br. 21), or (2) workers "involved in a transportation industry." (Pet. Br. 24). There are, however, numerous instances in which employees within the enumeration--seamen and railroad employees--would not satisfy one or both of the proposed alternative tests.

There are several categories of seamen who fall outside both proposed limitations. The most obvious is seamen on fishing boats. These boats do not ordinarily travel between states; they leave a home port, catch fish in inland waters or on the high seas, and then return to the state where they originated. Fishing is obviously not a transportation industry. Yet most of these enterprises are engaged in commerce, because they are catching fish to be sold in an interstate market. Seamen on these boats are like workers in a mine or a car factory. Similarly, there are seamen who work on exploration activities for oil companies who would not meet

either of petitioner's proposed standards.[8] Many of these seamen are members of the Seafarers International Union, the original proponent of the section 1 exemption. There are some railroad workers who would not meet either proposed standard.[9]

A requirement that workers actually move goods or people between states would delineate a factor not common to additional railroad employees. Most employees of interstate railroads engage in commerce without ever personally moving goods or people; some purchase (or resell) in interstate markets fuel or rolling stock (which may or may not be used in the railroad's interstate activities), manage the railroad's funds or other investments, sell coal from the company's mines, purchase in interstate markets items, such as food, for resale to (interstate or intrastate) travelers, or license the name of the railroad for use on toys or other items. Similarly, purely intrastate railroads engage in commerce by doing many of these same things. Thus the Long Island Railroad engages in interstate commerce when it she buys diesel fuel from a New Jersey refinery, or purchases from the Hershey Company in Pennsylvania candy to be resold to commuters.

Similarly, the proposed alternative requirement of involvement in "the transportation industry" would exclude still more seamen. Many oil companies own their own fleets of tankers; some mining companies operate their own ships

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[8] Seamen run the boats which explore for offshore oil and that service offshore drilling platforms. Some offshore drilling, especially in deep waters, is done from boats rather than platforms anchored on the seabed.

[9] Some logging companies have built their own intrastate railroads to move timber from logging areas to the company's mills. A number of mining companies built and operate rail lines to move coal or other minerals from a mine head to a processing plant. These activities are in interstate commerce because they produce goods for sale in interstate markets.

and barges to move minerals, particularly on the Great Lakes. The seamen involved are in the oil or mining industries, not the transportation industry. "Engaged in commerce" cannot be subject to a limitation that would not reach, for example, the captain and crew of the Exxon Valdez. And a requirement of involvement in the transportation industry would exclude some workers who do in fact move goods across state lines, the driver of a HomeGrocer.com or Hecht Company truck making a delivery from Washington, D.C., to the Maryland suburbs, a diamond merchant bringing jewels from New York to California, or a courier delivering securities or a work of art.

The rule proposed by petitioner would have any number of strange consequences. If a consumer ordered over the internet food that came from an out-of-state source, the truck driver who delivered it would be within the exemption if he or she worked for Federal Express, but not if he or she worked for HomeGrocer.com. A worker who sold coal in interstate commerce would be covered if employed by a railroad, but not if by a coal company. If an Amtrak employee in Pennsylvania bought diesel fuel from an Exxon employee in Texas or electricity from Consolidated Edison employee in New York, the buyer's agent would be a "worker engaged in interstate commerce" but the sellers' agents would not.

The mechanical manner in which petitioner seeks to apply ejusdem generis is inconsistent with the methodology appropriate to that method of construction. When a general term is preceded by an enumeration, application of ejusdem generis requires considerable care in determining the characteristic common to the items on the list with which the legislature was concerned.

> The doctrine of ejusdem generis calls for more than merely an abstract exercise in semantics and formal logic. . . . The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the act's provisions by force of the

> general reference. In most instances there is a wide range of ways in which classes could be defined, any one of which would embrace all of the members in an enumeration. Germaneness to the subject and purpose of the statute, viewed in terms of legislative intent or meaning to others, is the basis for determining which among various semantically correct definitions of the class should be given effect.

2A N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION §47.18, p. 289 (6th ed. 2000). Far from articulating any coherent purpose that would be served by exempting from the FAA only workers who moved goods, or only workers in transportation industries, but not other employees of firms engaged in commerce, petitioner expressly disavows any explanation. (Pet. Br. 26)("Conjecture abounds").

III. CONGRESS DID NOT INTEND THE FAA TO DEPRIVE A BROAD CATEGORY OF WORKERS OF THE RIGHT TO TRIAL BY JURY.

Petitioner suggests that Congress may have chosen to exempt railroad workers and seamen because "federal legislation already provided for arbitration of [their] grievances . . . , so that additional coverage by the FAA would be redundant." (Pet. Br. 26). The actual terms of that pre-FAA legislation, however, instead support a very broad interpretation of the exemption.

The critical change in the law worked by the FAA, where it applied, was to render enforceable an agreement to arbitrate *future* controversies that had not yet arisen between the parties. Section 2 applies to "[a] written provision in any . . . contract . . . to settle by arbitration a controversy *thereafter* arising out of such contract" (emphasis added), as well as to agreements to arbitrate existing disputes. Pre-FAA federal legislation regarding railroad workers and seamen, on the other

hand, was expressly limited to *post*-controversy agreements to arbitrate existing disputes.[10] Federal statutes had repeatedly forbidden employers from making or enforcing contracts with their workers that purported to limit in advance their ability to seek redress in the courts.[11]

This pre-FAA legislation evinces three congressional concerns. First, while providing to seamen and railroad employees the option of taking any known, existing controversy to arbitration, rather than to court, these laws sought to preserve and protect access to courts for workers who did not want to arbitrate a particular dispute. Second, Congress recognized the ability of employers to dictate contract terms to existing or prospective employees, and was determined not to permit the abuse of that power to strip workers of legally established remedies. Third, in the case of the FELA itself, under which employees had a constitutional and statutory right to a jury trial, these limitations protected workers from coercive employer action designed to shift a dispute to a forum less favorable to the worker than juries might be.

Petitioner's bare speculation that Congress singled out railroad employees as examples of an existing arbitration scheme is dubious. As this Court has repeatedly stated, the

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[10] 17 Stat. 262, 267 § 24 (arbitration by shipping-commissioner limited to a specific question agreed upon by seaman and employer); 38 Stat. 103, 105 § 4(5) (agreement to arbitrate must "state specifically the questions to be submitted . . . for decision.") Only an agreement to arbitrate reached after a dispute had arisen could spell out in the required manner the specific question which the arbitrator was to decide.

[11] E.g. 45 U.S.C. § 55 (FELA) ("Any contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."), originally enacted as Act of Apr. 22, 1908, §5, 35 Stat. 65, and upheld as constitutional in *Mondou v. New York, N. H. & H. R.R. Co.*, 223 U.S. 1 (1912).

core of the protections given to railroad workers by the FELA is the right to trial by jury in both state and federal court:

> The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943)(citation omitted).

In *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952), for example, the Ohio court had set aside a plaintiff's jury verdict, enforcing a release which the injured worker had signed at the railroad's behest. This Court reversed, holding that the state court was required by, the FELA to submit all factual issues, including the validity of the release, to the jury. The Court emphasized that "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.* at 363.

In exempting from the FAA not only seamen and railroad employees, but also other workers engaged in commerce, Congress intended to assure that the FAA could not be used to inflict on millions of American workers the very abuses from which Congress had earlier acted to protect railroad employees and seamen.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

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APPENDIX A

FEDERAL STATUTES LIMITED TO PERSONS ENGAGED IN COMMERCE

7 U.S.C. § 511a (regulation of tobacco producers engaged in commerce)

13 U.S.C. § 303 (Secretary of the Treasury to collect certain information on persons engaged in foreign commerce)

15 U.S.C. §§ 13, 13a, 14, 18, 18a (Clayton Act prohibitions regarding businesses engaged in commerce; Robinson-Patman Act)

15 U.S.C. § 26a(a) (forbidding restraint of trade in gasahol by persons engaged in commerce)

15 U.S.C. § 291 (prohibition against use of phrase "United States assay" on gold by firms engaged in commerce)

15 U.S.C. § 78l(g) (securities law applies to an issuer engaged in interstate commerce)

15 U.S.C. §§ 79l(g), 79(m) (regulation of public utility companies engaged in interstate commerce)

15 U.S.C. §§ 1221(b), 1222 (regulating relations between franchisees or dealers and manufacturers engaged in commerce)

15 U.S.C. §§ 1607(c), 1679h(b)(A), 1681s(a)(1), 1691c(c), 1692l(a) (regulation of credit practices by persons engaged in commerce)

15 U.S.C. § 1693o(c) (regulation of electronic funds transfers by persons engaged in commerce)

18 U.S.C. § 662 (prohibition against acceptance by agricultural inspector of a gift from an agent of a firm engaged in commerce)

18 U.S.C. § 1962 (RICO barring use of racketeering proceeds by enterprise engaged in interstate commerce)

29 U.S.C. § 207(a) (maximum hours for employees engaged in commerce)

42 U.S.C. § 6276 (information regarding energy technology to be provided to persons engaged in commerce)

42 U.S.C. § 6391 (federal agencies to seek to prevent foreign nations from discrimination against U.S. citizens "engaged in commerce" abroad)

50 U.S.C. App. § 2170 (restrictions on takeover of persons engaged in interstate commerce where contrary to national security)

50 U.S.C. § 2170a(a) (prohibition against takeover of company engaged in interstate commerce which has a contract with the Department of Defense)

APPENDIX B

FEDERAL STATUTES EXPRESSLY LIMITED TO INTERSTATE TRANSPORTATION OF PERSONS OR GOODS

7 U.S.C. §§ 1561, 1571, 1572, 1573 (interstate transportation of seeds)

7 U.S.C. §§ 2131(2), 2132 (i), 2134, 2143, 2145 (interstate transportation of animals)

15 U.S.C. §§ 261, 262 (observation of time zones by carriers engaged in interstate or foreign commerce)

15 U.S.C. §§ 715b, 717, 717f, 717y (interstate transportation of certain petroleum)

15 U.S.C. § 1271 (transportation of hazardous materials by carriers engaged in interstate commerce)

18 U.S.C. § 33(a) (explosives in cars, etc. engaged in interstate commerce)

18 U.S.C. § 231 (interstate transportation of explosives)

18 U.S.C. § 660 (embezzlement or theft from persons engaged in commerce as a common carrier)

21 U.S.C. § 373 (carriers engaged in interstate commerce)

21 U.S.C. §§ 458(a), 460(a), 464(c)(1) (interstate transportation of poultry)

21 U.S.C. § 373 (records to be kept by carriers engaged in interstate commerce)

21 U.S.C. § 464(c)(i) (regulation of poultry products transported in interstate commerce)

21 U.S.C. § 610(c) (prohibition against interstate transportation of certain adulterated food)

21 U.S.C. §§ 619, 623 (interstate transportation of carcasses)

21 U.S.C. §§ 641, 644 (interstate transportation of certain meat)

21 U.S.C. §§ 1037, 1039 (interstate transportation of eggs)

33 U.S.C. §§ 1321(a)(2), 1322(a)(2), 2701(29) (pollution regulations regarding a vessel engaged in interstate commerce)

38 U.S.C. § 3672(c)(2) (training programs by carriers engaged in interstate commerce)

42 U.S.C. § 4916 (regulation of noise by carriers engaged in interstate commerce)

42 U.S.C. § 4917 (regulation of noise levels of motor carriers engaged in interstate commerce)

42 U.S.C. § 8441(f)(3) (regulation of persons engaged in interstate transportation of natural gas)

42 U.S.C. § 6939d(c)(1) (exemption regarding certain hazardous wastes for public vessels not applicable to a vessel engaged in commerce)

43 U.S.C. § 1862 (authority of FERC to regulate interstate transportation of natural gas)

45 U.S.C. § 181 (regulation of air carriers engaged in interstate or foreign commerce)

45 U.S.C. § 1104(6) (definition of rail carrier)

45 U.S.C. § 1207 (Alaska Railroad designated rail carrier engaged in interstate or foreign commerce)

46 U.S.C. § 8503(a)(1) (pilots on vessel engaged in interstate or foreign commerce)

46 U.S.C. App. §§ 354, 355 (passports or persons on and papers of vessels engaged in interstate or foreign commerce)

46 U.S.C. App. § 1121(h) (authority to investigate aircraft engaged in interstate or foreign commerce)

49 U.S.C. §§ 5102(9), 5109(f), 5110(a) (interstate transportation of hazardous materials)

49 U.S.C. § 14502 (entities protected against tax discrimination by states)

49 U.S.C. § 14505(3) (limitation on state taxes)

49 U.S.C. § 80504 (eligibility for Presidential medal of honor)

49 U.S.C. §§ 20104(c), 20109(a), 20109(b)(1) (safety on rail carrier engaged in interstate or foreign commerce)

50 U.S.C. App. § 2017(a)(d)(1) (war claims relating to death of persons on vessels engaged in commerce on the high seas)

(21)

No. 99-1379

IN THE

Supreme Court of the United States

SEP 19 2000

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," bars employers from enforcing imposed arbitration schemes under the Act?

2. Whether the Act permits enforcement, under the pretext of "arbitration," of unregulated dispute-resolution policies that prevent employees from effectively vindicating their rights, including imposition of biased arbitrators, shortening of the limitations period, unfair procedures, excessive forum fees and arbitrators' fees, and revocation or limitation of statutory remedies?

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization.

The NAACP Legal Defense & Educational Fund, Inc. (the "Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organiza-

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[1]The position *amici* take in this brief has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

tion that uses the power of the law to define and defend women's rights.

SUMMARY OF ARGUMENT

The rush by employers over the past decade to impose unregulated arbitration on their employees warrants close examination of Congress's policy choice under §1 of the FAA to exclude "contracts of employment" from the Act's scope. In Part I of this brief, we highlight some of the more oppressive provisions of Circuit City's "Dispute Resolution Agreement." In Part II, we show the repercussions of this case for all federal and state employee-protective legislation.

Finally in Part III, we show that if the FAA applies to most employment disputes, the courts must shoulder the burden to assure that employees do not forgo substantive rights in arbitration. To safeguard their rights against employers, employees will often have to litigate twice: first to invalidate unfair or oppressive arbitration provisions, and second to reach the merits of their claims. This regime increases the burden on civil rights plaintiffs as well as the courts, at odds with Congressional intent that such claims be facilitated. To enforce arbitration of employment law claims, courts must at a minimum insist upon elements that would preclude the abuses detailed below. Many current policies, including Circuit City's, fall well short of these due process standards.

ARGUMENT

I. Circuit City's "Dispute Resolution Agreement" Exemplifies the Peril of Unregulated, Imposed Arbitration in the Workplace

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-33 (1991), arbitration between a sophisticated employee (a stockbroker) and his employer was enforced because it was

governed by a U-4 registration, backed by a panoply of procedural safeguards and regulatory oversight by the SEC. By contrast, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), arbitration under a collective bargaining agreement ("CBA") did not bar a Title VII judicial forum, because the plaintiff did not herself consent to waive her right to suit, and had no control over the arbitration. Circuit City's unconsented arbitration policy falls on the *Alexander* side of the line.[2]

The Circuit City "Dispute Resolution Agreement" and "Dispute Resolution Rules and Procedures" ("DRA," J.A. 19-39) have often been litigated.[3] Some courts have refused to compel arbitration under the DRA because it caps back pay and punitive damage awards below federal limits (DRA Rule 32, J.A. 35-36).[4] As one judge wrote: "Punitive damages and back pay are powerful deterrents to employers who might otherwise

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[2] *See also Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998) ("*Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA")

[3] *See, e.g., Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998), *following remand*, 203 F.3d 821 (4th Cir.), *cert. denied*, 120 S. Ct. 2744 (2000); *Circuit City Stores, Inc. v. Shelton*, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815 (S.D. Ohio 1999); *Sportelli v. Circuit City Stores, Inc.*, No. CIV. A. 97-5850, 1998 WL 54335 (E.D. Pa. Jan 13, 1998). The company has also filed a declaratory judgment action against the EEOC to establish the legality of the company's compulsory arbitration program, a complaint ultimately dismissed on jurisdictional grounds. *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491 (E.D. Va. 1999).

[4] The DRA awards back pay "only up to one year from the point at which the Associate knew or should have known of the events giving rise to the alleged violation of law," and caps punitive damages at 100% of back and front pay (if any) or $5000. This provision contradicts Title VII, which provides two years' back pay (42 U.S.C. § 2000e-5(g)(1)), and section 1981, which does not cap punitive damages (42 U.S.C. § 1981a(b)(4)).

discriminate on the basis of race. The failure of the Circuit City arbitration provision to provide those remedies shields Circuit City from the full force of Section 1981 and prevents Plaintiff from effectively vindicating her rights."[5]

Other provisions of the DRA (1) require employees to pay one-half the cost of arbitration, and allow shifting of all arbitration fees and costs to losing employees (DRA Rule 30, J.A. 33-34); (2) revoke presumptive and even mandatory statutory awards of attorneys' fees, committing such awards to broad arbitral discretion (DRA Rule 31, J.A. 34-35); (3) set a blanket one-year limitations period for all claims, irrespective of longer statutes of limitations (DRA Rule 6(a); J.A. 23-24); (4) impose the terms of the DRA only upon employees, leaving Circuit City's right to sue its employees in court unimpeded (DRA Rule 2, J.A. 20-21); (5) reserve the company's power to amend the DRA periodically, without requiring the approval of any public regulatory agency or the employees (DRA Rule 37, J.A. 37-38); and (6) declares—in case any provision be found unenforceable—a non-acquiescence rule, allowing Circuit City to enforce it elsewhere (DRA Rule 36, J.A. 37).[6]

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[5] *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533, 1538 (D. Md. 1999), *aff'd sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir.), *cert. denied*,120 S. Ct. 2744 (2000); *Gannon v. Circuit City Stores Inc.*, No. 4:00CV330 JCH, 2000 U.S. Dist. LEXIS 12125 at *9-11 (E.D. Mo. July 10, 2000) (caps on remedies prevent worker from "effectively vindicating" rights). *Cf. Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287-88 (N.D. Ala. 2000) (striking out DRA caps on damages).

[6] Circuit City has left itself an alternative if the Court finds that the FAA does not apply to contracts of employment. The DRA separately provides that its terms may be enforced under the Uniform Arbitration Act of Virginia, VA. CODE ANN. § 8.01-581.01 *et seq.* (DRA Rule 34, J.A. 36-37). The Virginia Act, unlike the FAA, applies expressly to employment cases. *Id.* But the California Supreme Court held just a month ago that arbitration of claims under the state's Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* (such as this case) are subject to rigorous due process standards. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, No. S075942, 2000 WL 1201652 (Cal. Aug. 24, 2000).

All of these provisions redound to Circuit City's advantage, and this is no accident because the company set the terms unilaterally. Respondent had to "consent" to the DRA as a mandatory condition of applying to work (J.A. 11). Circuit City's DRA is a far cry from the intention—announced by the Court in *Gilmer*, 500 U.S. at 26—that employees under arbitration policies would not "forgo the substantive rights afforded by" state and federal labor and employment laws.

II. The Court's Interpretation of Section 1 of the FAA Will Affect All Employee-Protective Legislation

To interpret the exclusion in §1 of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," the Court must place the FAA against the backdrop of numerous federal laws enacted since 1925 protecting workers' rights. It is appropriate for the Court to consult such subsequent enactments here, as it did in last Term in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000). There, the Court relied upon tobacco legislation passed by Congress subsequent to the Food, Drug, and Cosmetics Act: "At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* at 1306 (citation omitted). As the Court construes the §1 exclusion in the FAA, it must harmonize this section with a

body of national laws regulating employment of persons in interstate commerce.

A. Since 1925, National Regulation of Employment Has Become Commonplace

Congress enacted the FAA in 1925 against a legal backdrop of minimal federal regulation of employment.[7] The Court declared unconstitutional — as exceeding Congress's commerce clause powers — laws banning "yellow dog" contracts and child labor. *See Adair v. United States*, 208 U.S. 161, 179 (1908) (no connection between interstate commerce and membership in a labor organization), *overruled by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (no regulation of "local matters" by prohibiting movement in interstate commerce"), *overruled by United States v. Darby*, 312 U.S. 100 (1941); *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 504 (1908) (striking down Employers' Liability Act because provisions applied to all employees of common carriers, even if they did not work directly in interstate commerce). Obversely, the Court upheld federal labor laws directly incident to regulating interstate common carriers, such as railroads.[8]

By the mid-twentieth century, when Congress reenacted the FAA (July 30, 1947, ch. 392, § 1, 61 Stat. 669), the federal role

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[7] Employment was considered primarily a local matter and the commerce clause was deemed to authorize Congressional action to protect workers only in the channels of interstate commerce.

[8] *See, e.g., New York Central R. Co. v. Winfield*, 244 U.S. 147, 148 (1917) ("[i]t is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce"); *Wilson v. New*, 243 U.S. 332, 349 (1917) (finding eight-hour-day law for interstate rail workers to fall within Congress's power "to deal not only with the carrier, but with its servants").

in labor relations had transformed dramatically. In the crucible of the Great Depression and the Second World War, Congress passed a host of statutes to protect workers' rights. *See, e.g.*, the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* (enacted 1932); Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (enacted 1947); Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (enacted 1938). These acts included a private right of action.[9] In addition, this Court in 1944 implied a cause of action for the breach of duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 206-07 (1944). *See also Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (recognizing employee's individual right to sue employer along with union for breach of CBA under § 185 of the LMRA).

Against the backdrop of these new laws, courts were circumspect about applying the FAA to the workplace. *See, e.g., Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450 (1957) (applying § 185 of the LMRA to a CBA without mentioning FAA), *and id.* at 466 (Frankfurter, J., dissenting) (concluding that FAA did not apply to labor contracts). Even today—unacknowledged by the petitioners' brief (at 8, 11, 37-38)—courts continue to hold that CBAs are excluded from the FAA.[10] A contrary decision of this Court would work a major

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[9] *See* LMRA, 29 U.S.C. §§ 185, 187 (action for breach of CBA or for unfair labor practices); FLSA, 29 U.S.C. § 216(b) (action for violations of wage and hour laws).

[10] The Court noted in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 78 n.1 (1998), that the Fourth Circuit holds that the FAA does not apply to labor contracts. At least five federal courts of appeals so hold, even with contracts outside the transportation industry. *See, e.g., Posadas de Puerto Rico v. Association de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989) (hotels); *Domino Sugar Corp. v. Sugar Workers Local 392*, 10 F.3d 1064, 1067 (4th Cir. 1993) (sugar growers); *Int'l Union of Electrical, Radio & Machine Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889 (5th Cir. 1983),

and unknown transformation on this line of cases.

In the half-century since the re-enactment of the FAA, the federal role in employment matters has continued to widen. The legislative response to the 1960's civil rights movement blossomed into a series of statutes dedicated to the elimination of employment discrimination. *See, e.g.,* Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* Employee benefits were also mandated and regulated on a national level during this period. *See, e.g.,* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*; Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*; Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* Each of these statutes created private rights of action. Before *Gilmer*, the lower courts viewed such statutes as the reserve of the judiciary and refused to compel arbitration of those claims.[11] This view found support in the Court's unanimous decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

B. In Non-Union Settings, Statutory Claims Are Increasingly Subjected to Unregulated Arbitration Schemes

The labor market quickly flooded with arbitration policies

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cert. denied, 466 U.S. 928 (1984); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988) (chemical workers); *United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943 (10th Cir. 1989) (supermarkets).

[11] *See, e.g., Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990); *Nicholson v. CPC Int'l*, 877 F.2d 221, 227 (3d Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306-07 (8th Cir. 1988).

in the wake of *Gilmer*,[12] often appearing as boilerplate in job applications such as at Circuit City (J.A. 12-17).[13] These provisions are especially pernicious in low-wage, entry level jobs, where the applicant or employee has no bargaining power and lacks the legal sophistication even to know what to bargain about.[14] Arbitration has long been used at union shops as a substitute for strikes, (*Textile Workers*, 353 U.S. at 455), but unions, unlike individuals, know the dangers to avoid.

Since *Gilmer*, federal courts have become the beachhead of employers' nationwide campaign to privatize the resolution of employment disputes. In this case, plaintiff sued in state court under California's Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* (West 2000). This is the sort of legislation Congress meant to foster when it adopted the Civil

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[12] *See, e.g.,* Jenny Strasburg, *Proceeding Under Fire*, S. F. EXAMINER, April 30, 2000 at B1 (American Arbitration Association reports in 1999 having heard 1,950 employment arbitration cases nationally, 950 stemming from imposed arbitration policies and 300 involving Title VII claims); Michael A. Verespej, *Sidestepping Court Costs*, INDUSTRY WEEK, Feb. 2, 1998, at 68 (more than 400 employers, with a combined 4.5 million employees, have subscribed to some form of alternative dispute resolution for employment claims, mostly within the past two years); Leslie Kaufman and Anne Underwood, *Sign or Hit the Street*, NEWSWEEK, June 30, 1997, at 48 (noting that employers such as ITT, JCPenney, Brown & Root, and Renaissance Hotels adopted arbitration systems for employment disputes).

[13] With no little irony, Circuit City notifies applicants that they "may wish to seek legal advice before signing ," (J.A. 14) despite the folly in telling job aspirants to retain counsel before submitting a job application.

[14] *See EEOC v. Waffle House, Inc.*, 193 F.3d 805, 816 (4th Cir. 1999), *petition for cert filed*, 68 U.S.L.W. 3726 (May 1, 2000) (No. 99-1823) (King, J., dissenting) (employee who signed arbitration "agreement" was $5.50-an-hour grill operator); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 941 (N.D. Ind. 2000) (waiter at chain restaurant); *Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 154 (N.D. Ill. 1997) (teenage cashiers). *Cf. Gilmer*, 500 U.S. at 33 (broker was sophisticated "businessman").

Rights Act.[15] *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 282-3 (1987) (noting "the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity"). Indeed, under California law, the DRA was likely unenforceable because of its limits on remedies and discovery. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, No. S075942, 2000 WL 1201652 (Cal. Aug. 24, 2000) (Mosk, J.). Circuit City responded with a federal-court action to enforce the DRA.

Despite Congress's express solicitude toward state civil rights enforcement, employers now use imposed arbitration policies as a shield against those very state laws, as well as other state employee welfare statutes.[16] The FAA has been held to preempt all contrary state laws regarding arbitration, so all state employee-protective statutes (even those that specifically preclude arbitration of employees' claims)[17] must bend to federal supremacy. *See, e.g., Doctor's Associates, Inc. v.*

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[15]*See* 42 U.S.C. § 2000e-5(b) to -5(f) (EEOC cooperation with State and local authorities); 42 U.S.C. § 2000e-7 ("[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . ."); 42 U.S.C. § 2000h-4 (disclaiming Congressional intent "to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter").

[16]*See, e.g., Miller v. Public Storage Management, Inc.*, 121 F.2d 215, 219 (5th Cir. 1997) (anti-retaliation claim); *Strawn v. AFC Enterprises, Inc.*, 70 F. Supp. 2d 717, 727-28 (S.D. Tex. 1999) (workers' compensation); *Young v. Prudential Ins. Co. of America*, 297 N.J. Super. 605, 622, 688 A.2d 1069, 1079 (App.Div.) (whistleblower statute), *cert. denied*, 149 N.J. 408, 694 A.2d 193 (1997); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1525, 60 Cal. Rptr. 2d 138, 140 (1997) (labor code).

[17]*See generally* Brief of the States of California, etc. as *Amici Curiae* in Support of Respondent (setting forth state laws barring or limiting arbitration of employment law claims).

Casarotto, 517 U.S. 681, 687 (1996). It has even been invoked to prevent a state civil rights agency from enforcing state law.[18]

Under federal law, the effects of imposed arbitration have been most pronounced in civil rights cases (e.g. Title VII, ADA, ADEA), but have also touched other statutes.[19] Its use intrudes upon a joint public/private mechanism for enforcing Title VII rights crafted by Congress. This joint mechanism (1) authorizes the EEOC to investigate and conciliate claims of discrimination, to interpret the law (42 U.S.C. §§ 2000e-5(b) and 2000e-12) and to litigate claims (*id.* § 2000e-5(f)(1)); (2) grants the Justice Department enforcement authority (*id.* §§ 2000e-5(f)(1) and 2000e-6); and (3) establishes a private right of action (*id.* § 2000e-5(f)(1)).[20]

This deliberate structure does not contemplate imposition of arbitration. Congress in 1991 authorized arbitration of discrimination claims "where appropriate" in the Civil Rights Act of 1991,[21] but never endorsed *imposed* arbitration policies

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[18]In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818-19 (8th Cir. 2000), *petition for cert. filed*, August 25, 2000 (No. 00-317) the employer successfully enjoined, under the FAA, the Missouri Commission on Human Rights from proceeding with administrative action under state law on behalf of an employee who signed a Form U-4 to obtain monetary or equitable relief.

[19]*See, e.g., Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (FLSA); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (ERISA); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 369 (7th Cir. 1998) (Equal Pay Act); *Jones v. Fujitsu Network Commun., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (FMLA); *Shaw v. DLJ Pershing*, 78 F. Supp. 781, 782 (N.D. Ill. 1999) (Section 1981).

[20] EEOC NOTICE, NO. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997) (http://www.eeoc.gov/docs/mandarb.html).

[21]The amendment authorizes, but does not require, alternative

such as Circuit City's, particularly unregulated schemes that seek to shield employers from the remedies enacted by Congress.[22] While this Court declined conclusively to interpret these provisions of the Civil Rights Act of 1991 in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 n.2 (1998), it declined to find an arbitration clause in a CBA, stating that "absent a clear waiver, it is not 'appropriate'. . . to find an agreement to arbitrate." Congress's insistence upon "appropriate" dispute resolution demands something more than acquiescence to imposed, unregulated arbitration policies.

III. Arbitration Programs Are Often Crafted to Relieve Employers of Legal Burdens, Rather than to Provide Employees a Fair Opportunity to Vindicate Substantive Rights

The FAA does not define"arbitration," but a respected treatise describes it as a "'simple proceeding voluntarily chosen by the parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.'" ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 5TH ED. at 2 (BNA 1996) (citation omitted). The

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dispute resolution (including arbitration) under Title VII, ADEA and the ADA. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991); 42 U.S.C. § 12212 ("where appropriate and to the extent authorized by law, . . . arbitration . . . is encouraged to resolve disputes arising under" these acts).

[22]The Ninth Circuit interprets these provisions affirmatively to preclude imposed arbitration under Title VII. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998). That court so far stands alone in its view. *See, e.g., Desiderio v. Nat'l Assoc. of Securities Dealers*, 191 F.3d 198, 203-06 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 11 (1st Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir.1998), *cert. denied*, 525 U.S. 1139 (1999).

reality in the workplace is far different. There is no sign that the FAA was meant to shield anything labeled "arbitration" regardless of voluntariness, impartiality, and fidelity to the law.

The *Gilmer* Court expected that arbitration would constitute only a change in forum, presuming that parties would "'not forgo the substantive rights afforded by the [ADEA].'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Supporters of arbitration thought that fair procedures would attract employees, leading to speedy resolutions.[23] The Court left to future, case-by-case development whether particular arbitral fora afforded employees a fair opportunity to present claims and obtain remedies. *Id.* at 31-32.

Contrary to these expectations, though, employers like Circuit City have subverted the concept of arbitration to pursue an agenda inimical to civil rights. The judicial task of policing these arbitrations is immense, given the employers' overwhelming temptation to draft their policies in a way that gives them an "edge" and limits their risk even if an employee manages to win, and in the absence of any administrative body with authority to curb such abuses. Employers are forcing workers to bear the costs of arbitration, suffer shortened periods of limitations, surrender rights to damages and attorneys' fees,

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[23] George Nicolau, past president of the National Academy of Arbitrators, observed that a voluntary arbitration system living up to the promise of *Gilmer* would attract employees who desired a prompt, inexpensive hearing of their claims. George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U.Pa. J. of Lab. and Employ. Law 175, 189-90 (1998). *See also* Ashlea Ebeling, *Better Safe Than Sorry*, FORBES, Nov. 30, 1998, at 162 (voluntary program for 65,000 United Parcel Service employees led to 197 claims, 75% resolved in program, and no lawsuits.)

or proceed under one-sided rules.[24] Such abuses led the National Academy of Arbitrators in 1997 to urge abandonment of imposed pre-dispute arbitration for employment discrimination claims.[25] Without regulatory safeguards, an "agreement" to arbitrate becomes an impermissible prospective waiver of civil rights. *Alexander*, 415 U.S. at 51-52 (Title VII rights "not susceptible of prospective waiver").

Even if courts oversee arbitrations, employees face an expensive, uphill battle to enforce their rights. Those wishing to challenge agreements must hire counsel, spend money, and endure extensive, extra-merits litigation just to win the right to start all over again in court. This runs contrary to the mandate of Title VII to expedite litigation of claims, and to waive filing fees, appoint counsel, and pay for attorneys' fees so that the

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[24]Commentators have written widely about the expansion of arbitration in the civil rights arena. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L. J. 1 (1996); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment*, 16 Ga. St. U.L.Rev. 293 (1999); Eduard A. Lopez, *Mandatory Arbitration of Employment Discrimination Claims: Some Alternative Grounds for Lai, Duffield and Rosenberg*, 4 Employee Rts. & Employment Pol'y J. 101 (2000); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395 (1999); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts for the 1990s*, 73 Denv. U. L. Rev. 1017 (1996); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 719-25 (1999).

[25]*Statement of the NAA on Individual Contracts of Employment and Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems*, May 21, 1997 (http://www.naarb.org/guidelines.html) (opposing "mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights").

courts will be open to victims who could not otherwise afford to litigate their claims. *See* 42 U.S.C. § 2000e-5(f)(5).

Preemptive litigation may even be instigated by the employer. The Lawyers' Committee once represented a female employee at a Hooters restaurant, Annette Phillips, who was sued by her employer (the parent company, Hooters of America, or "HOA") for declaratory judgment to enforce its corporate arbitration policy against her then-pending sexual harassment claim. HOA filed its complaint on November 4, 1996. *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 588 (D.S.C. 1998). HOA moved for a preliminary injunction to restrain Phillips from filing any state or federal court action relating to her former employment, and to compel arbitration of her claims under the FAA, 9 U.S.C. § 4. *Id.* After briefing described as "extensive" and "voluminous" by the district judge (*id.* at 591), there followed discovery and a three-day evidentiary hearing, including expert witnesses testifying about the standards of fairness in arbitration and the operation and relative fairness of Hooters' arbitration agreement (*id.* at 592-93). Extensive findings in Phillips' favor were entered on March 12, 1998. *Id.* Over a year later, on April 8, 1999, the Fourth Circuit affirmed, in an opinion that excoriated the company's program as "utterly lacking in the rudiments of even-handedness." *Hooters of America v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999).[26] Thus, it took two and a half years

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[26]The Fourth Circuit affirmed findings of the district court that Hooters' rules allowed the employer exclusively to (1) avoid filing any written response to the employee's claim, (2) avoid disclosing its witnesses, (3) control the list of arbitrators, (4) expand the scope of the arbitration to include new claims against the employee, (5) move for summary judgment, (6) create a record at the arbitration, (7) bring suit in court to overturn the award based on a preponderance of the evidence, (8) cancel the arbitration agreement on 30 days notice, and (9) modify the procedures immediately without notice to the employee. *Hooters*, 173 F.3d at 938-39.

of hammer-and-tongs litigation just to restore the employee's right to bring a Title VII action.

Arbitration of employment law claims is distinctive. There is usually no union to safeguard the process. Unlike arbitration of claims in the securities field, as in *Gilmer*—regulated by the SEC (15 U.S.C. § 78s; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987))—there is no over-arching federal executive authority to oversee arbitration and no self-regulatory organizations authorized by statute. And unlike arbitration in the commercial and consumer fields, there is a certain predestination to employment cases: people can often avoid entering into installment contracts or buying software, but nearly every grown person has to work.

A. Employers Often Impose Arbitration Policies Without Employees' Knowing and Voluntary Consent

Employers usually impose arbitration unilaterally, by distributing employment manuals or written policies with arbitration provisions. Circuit City obtains its employees' "consent" to the DRA by making them sign an acknowledgment at the same time they apply for a job.[27] Some employers even conceal the details of the arbitration policy and fail to inform employees what rights they may be waiving.[28]

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[27] "Circuit City does not consider an application for employment unless the Dispute Resolution Agreement is signed." (Affid. of Pamela G. Parsons, Assoc. General Counsel to Circuit City, J.A. 11.) *See also Smith v. Chrysler Financial Corp.*, 101 F. Supp. 2d. 534, 537 (E.D. Mich. 2000) (arbitration policy described in brochure mailed to 18,000 employees); *McClendon v. Sherwin Williams, Inc.*, 70 F. Supp. 2d 940, 943 (E.D. Ark. 1999) (arbitration policy "communicated to employees by dissemination of the [employee] handbook," and employee accepted policy "by continuing to stay on the job").

[28] *See Rosenberg*, 170 F.3d at 19-20 (employer falsely certified

Courts in some cases have declined to enforce such imposed arbitration. In *Bailey v. Federal Nat'l Mortgage Assoc.*, 209 F.3d 740 (D.C. Cir. 2000), the court held that the plaintiff had not consented to arbitrate under the employer's new policy where he expressly disaffirmed it in writing shortly after the policy was adopted. The court looked askance at the argument that the employee accepted the policy by remaining in the defendant's employ, doubting that an employer "could terminate a current employee solely because of his or her refusal to accept the new arbitration policy." *Id.* at 746. In *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 (9th Cir. 1998), the court reversed summary judgment, finding that the policy in question made no explicit reference to arbitration or waiver and consigned the details of the program to a separate publication.[29] Yet other courts have upheld such policies, substituting the fictitious "consent" of continuing to work.[30]

Courts have also split over whether relinquishment of the federal judicial forum and jury right[31] requires a knowing and

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to court that it provided employee with a copy of NYSE rules); *Hooters*, 39 F. Supp. 2d at 611-12 (rules not disclosed). Circuit City's application (J.A. 13-18) nowhere declares those legal rights (such as rights to a jury trial, attorneys' fees, discovery, and damages) sacrificed by the DRA.

[29] *See also Smith*, 101 F. Supp. 2d at 539 (no mutual assent to policy); *Phillips v. Cigna Investments Inc.*, 27 F. Supp. 2d 345, 353-59 (D. Conn. 1998) (employee did not lose legitimate expectation to judicial forum by continuing to work after employer promulgated arbitration policy).

[30] *Bishop v. Smith Barney, Inc.*, No. 97 CIV. 4807(RWS), 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998) (enforcing arbitration clause in employee manual without individual assent; written company policy sufficient under FAA); *Leonard v. Clear Channel Communications I*, No. 972320-D/A, 1997 WL 581439 (W.D. Tenn. July 23, 1997) (enforcing unsigned, unacknowledged arbitration agreement in employment manual).

[31] *See, e.g.*, 29 U.S.C. § 626(c)(2) (jury trial authorized for ADEA cases); 42 U.S.C. § 1981a(c) (jury trial for Title VII and ADA cases seeking

voluntary waiver, or is governed instead by ordinary contract principles. Some circuits have applied a contract standard, holding that arbitration must be compelled except in cases tainted by fraud or coercion,[32] while other circuits remain on the fence.[33] But the Ninth Circuit, in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299, 1304-5 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), held that the "text and legislative history of Title VII" required that an employee "knowingly agree[] to submit such disputes to arbitration."[34]

The knowing and voluntary standard follows from the standard applied generally to the waiver of a civil jury trial.[35] A waiver standard also comports with the history of the Civil Rights Act of 1991. Section 118 of the Act approves, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including, . . .arbitra-

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compensatory or punitive damages).

[32]*See, e.g., Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 229-30 (3d Cir. 1997).

[33]*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18 (1st Cir. 1999); *Halligan v. Piper Jaffrey Inc.*, 148 F.3d 197, 203 (2d Cir. 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129-30 (7th Cir. 1997).

[34]*See also Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760-61 (9th Cir. 1997) (applying *Lai* to ADA), *cert. denied*, 523 U.S. 1072 (1998); *Hooters*, 39 F. Supp. 2d at 612 (applying knowing and voluntary standard); *Penn*, 95 F. Supp. 2d at 950.

[35]*See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver"); *KMC Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985) (courts "overwhelmingly appl[y] the knowing and voluntary standard" to determine "the validity of a contractual waiver of [a civil] jury trial"); Grodin, *supra* note 12, at 36-9; Lopez, *supra* note 12, at 127-34.

tion."[36] The Seventh Circuit interpreted this provision in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997), to hold that arbitration would not be "appropriate when it is not agreed to by the worker but instead is merely imposed" by a CBA. The *Pryner* court took a page from history, observing that "by being forced into binding arbitration [employees] would be surrendering their right to trial by jury—a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII." *Id.* at 362. *Wright* left this question open.

B. Excessive Fees Deter Claims

Employers often try to shift some or all of the costs of arbitration to the complaining party. Rule 30 of Circuit City's DRA requires the parties to split fees 50-50 and authorizes the arbitrator to shift all arbitration fees and costs to the losing side. J.A. 33-34.[37] The prospect that an employee might have to

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[36]*See also* H.R. Rep. No. 102-40, Part I, 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 635 (stating that this section was "intended to supplement, not supplant, the remedies provided by Title VII"); 42 U.S.C. § 12212 (same provision for the ADA).

[37] *Compare* Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920 (authorizing shifting of narrowly enumerated costs). Arbitration costs can be steep. *See, e.g., Duffield v. Robertson Stephens & Co.* (9th Cir), Docket No. 97-15687, Appellant's Opening Brief at 34-36 (record of proceeding established that arbitrators in the securities field charge fees starting from $1000 per half-day, mounting up to $82,800 in one complex case, and such fees are imposed on each party.) *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997) (noting estimates for arbitrators fees in a typical employment case from $3,750 to $14,000); *Campbell v. Cantor Fitzgerald & Co.*, 21 F. Supp. 2d 341, 345 (S.D.N.Y. 1998), *aff'd*, 205 F.3d 1321 (2d Cir. 1999) (after thirty sessions over sixteen months, arbitrators rule against employee without written explanation and assessed employee $45,000 in hearing fees); Alleyne, *supra* note 12, at 410-11 (noting that arbitrators fees can run from hundreds to thousands of dollars); Edwards, *supra* note 12, at 306-07 (citing arbitrations where fees ran into tens of

deposit, on demand, thousands of dollars just for the privilege of arbitrating a claim will assuredly deter claims.[38]

Some courts bar companies from charging forum costs to the employee, striking down such agreements entirely.[39] Others simply sever such provisions from the agreement.[40]

Yet other circuits take the position that fee-splitting does not, standing by itself, invalidate an arbitration policy.[41] As the

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thousands of dollars).

[38] *See, e.g., Armendariz v. Foundation Health Psychcare Serv., Inc.*, No. S075942, 2000 WL 1201652 (Cal. Aug. 24, 2000) ("[t]he payment of large, fixed, forum costs, especially in the face of expected meager awards, serves as a significant deterrent to the pursuit of [civil rights] claims").

[39] *See, e.g., Shankle v. B-G Maintenance Mgt. of Colorado, Inc.*, 163 F.3d 1230, 1234-34 (10th Cir. 1999) (contract requiring plaintiff to shoulder one-half of arbitrator's fee, between $1,875 and $5,000, held unenforceable); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (refusing to compel arbitration under contract that imposed "hefty" arbitration costs and "steep filing fees" on employee); *Davis v. LPK Corp.*, 76 Fair Empl. Prac. Cas. (BNA) 954 (N.D. Cal. 1998) (invalidating agreement where employee had to bear one-half of the arbitrator's fee).

[40] *See, e.g., Fuller v. Pep Boys — Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158, 1162-63 (D. Colo. 2000); *Jones v. Fujitsu Network Commun., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999). Still others interpret the offending sections equitably to relieve the employee's burden. *See, e.g., Cole*, 105 F.3d at 1485 (court interprets fees provision from agreement to apply only to employer); *McWilliams v. Logicon, Inc.*, No. CIV. A. 95-2500-GTV, 1997 WL 383150, at *2 (D. Kan. June 4, 1997) ($1,300 fee shifted to employer), *aff'd*, 143 F.3d 573 (10th Cir. 1998).

[41] *See, e.g., Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 763 (5th Cir. 1999), *cert denied*, 120 S.Ct. 1833(2000). (approving apportionment of one-half of forum fees, $3,150, on employee); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (holding that prospect of fee-splitting did not render policy

D.C. Circuit held in *Cole*, 105 F.3d at 1485, a plaintiff "could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses." Indeed, "there is no reason to think that the [*Gilmer*] Court would have approved a program of mandatory arbitration of statutory claims . . . in the absence of employer agreement to pay arbitrator's fees." *Id.* at 1468.

This Court recently granted certiorari in *Green Tree Financial Corp.-Alabama v. Randolph*,178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000), a case raising the fee issue under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* The loan company admitted that decisions regarding apportionment fees and costs would be entirely in the discretion of the arbitrator, and such uncertainty led the court below to find the arbitration clause unenforceable. To require a plaintiff, especially an impecunious one, to amass a reserve of thousands of dollars just to commence a claim sacrifices substantive rights, and would lead to the wholesale abandonment of claims. How much worse, then, are policies such as Circuit City's that *explicitly* shift the burden to employees?

C. Employers Have Revoked Legal Remedies

In *Gilmer*, the Court particularly noted that the New York Stock Exchange ("NYSE") rules did "not restrict the types of relief an arbitrator may award." 500 U.S. at 32. *See also Desiderio v. Nat'l Assoc. of Securities Dealers*, 191 F.3d 198, 205 (2d Cir. 1999), *petition for cert filed*, 68 U.S.L.W., 3497 (Jan. 31, 2000)(No. 99-1285) (reaffirming need for full set of

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unenforceable); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 362 (7th Cir. 1999) (allowing fee-splitting).

statutory remedies under Title VII in arbitration). A full panoply of remedies and statutory safeguards are essential to deter and remedy employment discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (remedies available under Title VII constitute a "complex legislative design directed at an historical evil of national proportions").

Yet employers have sought to whittle down statutory remedies through artful and unequal crafting of arbitration agreements. Circuit City's DRA caps back pay and punitive damage awards below federal limits (J.A. 35-36); makes the award of attorneys' fees wholly within the discretion of the arbitrator[42] (J.A. 34-35); and chops down the limitations period to one year (J.A. 23-24). Other employers have likewise limited employees' remedies.[43]

Indeed, Circuit City's decision to cap the limitations period at one year regardless of the claim directly implicates the employees' substantive rights. Employer torts and statutory violations can carry longer statutes of limitations.[44] In Mr.

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[42] *See Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 261 n.34 (1975) (noting that under section 16(b) of the FLSA, 29 U.S.C. § 216(b), which also governs ADEA, award of fees to prevailing party is "mandatory"); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-417 (1978) (under § 706(k) of Title VII a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but very unusual circumstances).

[43] *See Paladino*, 134 F.3d at 1060-62 (policy provides only for contract damages); *Hooters*, 39 F. Supp. 2d at 612 (policy prevented full recovery of damages and attorneys fees); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 464-70 (S.D.N.Y. 1997) (policy barred award of statutory attorneys' fees); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027-28 (D.N.M. 1996) (policy did not provide full range of Title VII damages).

[44] See, e.g., *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Pgm.*, 2000 WL 1022713 (9th Cir. July 26, 2000) (*en banc*) (four-year statute of limitations for actions on written contract applies to ERISA action to recover disability benefits under written contractual policy

Adams' case, he would not necessarily have been required to commence a FEHA action within a year, because the timely filing of a charge tolls the limitations period. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 902 (9th Cir. 1994) (limitations period for plaintiff's FEHA claim tolled for more than four years during EEOC's investigation). But the DRA trumps all such rules. *See Stirlen v. Supercuts Inc.*, 51 Cal. App. 4th 1519, 1542, 60 Cal. Rptr. 2d 138 (1st Dist. 1997) (finding comparable one-year limitation on employees' claims under arbitration agreement unconscionable under California law).

Courts have even given tacit approval to this approach, determining that such terms—despite falling short of statutory norms—may be enforced by an arbitrator. In *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), the arbitration agreement included provisions waiving the employee's right to attorneys fees and punitive damages. The court referred the matter to arbitration to determine whether the plaintiff had agreed to abandon statutory rights. *Id.* at 231-32.[45]

By referring these matters to arbitration, these courts may have simply deferred litigation until the time to enforce the award, contrary to the expectation that arbitration should afford prompt and inexpensive relief. *Pryner*, 109 F.3d at 362 (noting the "spectre" of satellite litigation). The promise of such review may prove ephemeral, as we shall see in section E below.

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in California).

[45] *See also Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 187-88 (3d Cir. 1998) (reserving disputes over alleged inadequacies or unfairness of agreement to arbitrator); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir.1996) (directing ADEA plaintiff to pursue his unconscionability claim with the arbitrator); *Kinnebrew v. Gulf Insurance Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189, 191 (N.D. Tex. 1994) (referring claim to arbitration under policy that bars punitive damages, injunctive relief and attorneys fees).

The *Gilmer* Court also assumed that the EEOC would be available as a backstop to private arbitration policies. "An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Gilmer*, 500 U.S. at 28. But some courts hold that arbitration policies preclude (in varying degrees) even the government from obtaining relief on behalf of the employee.[46]

Against these cases, the Sixth Circuit has held that an arbitration agreement has no collateral effect on the EEOC and that it may independently seek to vindicate and remedy violations of civil rights.[47] This Court has already noted that the Commission represents the public at large, not individual victims of alleged discrimination in its suits. *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980). The Court should avoid an interpretation of the FAA that derogates the EEOC's and parallel state civil rights agencies' independent, public roles in enforcing anti-discrimination laws.

D. Arbitration Often Fails to Provide Fair and Accountable Procedures

Gilmer established that arbitration may substitute for civil

[46] *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818-19 (8th Cir. 2000) (barring state agency from obtaining individual relief for complainant); *EEOC v. Waffle House, Inc.*, 193 F.3d at 812 (barring EEOC from litigating individual claim unless it was prepared to seek "large-scale injunctive relief" on behalf of entire class); *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 302 (2d Cir. 1998) (barring EEOC from obtaining monetary damages).

[47] *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458-59 (6th Cir. 1999). *See also Circuit City Stores, Inc. v. Shelton*, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000) (dismissing company's petition to compel arbitration where plaintiff's only action was to file charge with EEOC).

litigation only when the arbitral forum affords fundamental procedural protections. 500 U.S. at 30-32.[48] But as long as employers are free to impose arbitration on employees, they can pile on onerous terms while shackling employees to them:

1. *Employers refuse to bind themselves to procedures that employees must follow.* Rule 2 of the DRA says that "claims of an [employee] . . . shall be settled exclusively by final and binding arbitration," but no reciprocal provision applies to the company. J.A. 20-21; *Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998) (DRA " does not appear to require the arbitration of any claims Circuit City might have against Johnson").

2. *Employers reserve to themselves the power to alter the procedures at their discretion.* Under DRA Rule 37 (J.A. 37-38), "Circuit City may alter or terminate the Agreement" at the end of each calendar year merely by tendering 30 days' written notice to employees. *See also Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (employer "reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from," employees); *Hooters*, 173 F.3d at 938-39 (same).

3. *Absence of neutral arbitrators.* *Gilmer* authorized

[48] *See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, May 9, 1995 (http:// www.naarb.org/protocol.html) (signed by representatives of the National Academy of Arbitrators, the American Arbitration Association, the Labor and Employment Law Section of the American Bar Association, and other organizations). *See also* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. Rev. 443, 489-90 (1995) (enforceable arbitration system would have to include right to counsel, adequate discovery, mutual selection of arbitrator, ability to call witnesses, and anti-retaliation commitment to cooperating witnesses).

arbitration against a backdrop of NYSE rules that provided for disclosure of the arbitrator's professional backgrounds, a right to strike arbitrators, and a duty upon arbitrators to disclose potential conflicts. 500 U.S. at 30. Yet some policies have given employers nearly unfettered control over who shall sit as arbitrators. *See, e.g., Hooters*, 173 F.3d at 941 (employer made up list of arbitrators itself); *Penn*, 95 F. Supp. 2d at 945-48 (employer's agent controlled who appeared on the lists of arbitrators).

4. *Arbitrary limits on discovery*. The NYSE rules under review in *Gilmer* expressly provided for "document production, information requests, depositions and subpoenas," sufficient to afford a "fair opportunity" for employees to present their claims. 500 U.S. at 31. But other policies have omitted such procedures. Circuit City, for instance, authorizes only three depositions as opposed to the ten depositions ordinarily allowed in Federal court. *Compare* J.A. 26-27, DRA Rule 13(b), *with* Fed. R. Civ. P. 30(a)(2)(A). *See also Hooters*, 173 F.3d at 938 (employer had no obligation to provide lists of witnesses or respond to plaintiff's written claim); *Penn*, 95 F. Supp. 2d at 948-49 (finding discovery provisions "severely limited"). Because employees typically know less about an employment decision than the employer itself, arbitrary limits on discovery may doom their claims.

5. *Secrecy of arbitration decisions*. Arbitration awards are typically confidential (*see* J.A. 31, DRA Rule 23),[49] and courts have not generally required arbitrators to memorialize their

[49] *See Code of Professional Responsibility for Arbitrators of Labor Management Disputes*, art. II, § C(1)(c) (making it a "violation of professional responsibility for an arbitrator to make public an award without consent of the parties"), *reprinted at* Jay E. Grenig, 26 *West Legal Forms: Alternative Dispute Resolution*, App. 11C at 770 (1995).

findings in writing.[50] By contrast, district courts must issue findings of fact and conclusions of law as a public record. *See* Fed. R. Civ. P. 52(a).

The publication of decisions in the civil rights field guides employees and employers alike about what conduct is lawful.[51] Conversely, cutting off publication of decisions impedes voluntary efforts to comply with the law.[52]

E. Judicial Review of Arbitration Awards Is Minimal

Gilmer recognized that judicial review was a corrective to errant arbitrators. 500 U.S. at 30-31. Yet the awards of commercial and labor arbitrations, based on interpretation of agreements freely bargained by the parties, have long been accorded deferential judicial review. *See, e.g., United Steelworkers*, 363 U.S. at 597-99 (where arbitrator's award concerns construction of CBA, court lacks authority to overrule the arbitrator's interpretation); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956) (no review of arbitrator's

[50] *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 976 n.8 (1960) ("[a]rbitrators have no obligation to the court to give their reasons for an award"); *Green v. Ameritech Corp.*, 200 F.3d 967, 974-76 (6th Cir. 2000) (affirming award in state law civil rights case that lacked findings and conclusions, even though arbitration policy expressly required arbitrator to "explain" decision).

[51] *Gilmer*, 500 U.S. at 31-32 (enforcement of U-4 would not hurt civil rights enforcement because NYSE rules require written and publicly available arbitration awards, and because "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements").

[52] *See* Moohr, *supra* note 12 (stressing the public goal of eradicating employment discrimination over simple goal dispute resolution in individual discrimination cases); Van Wetzel Stone, *supra* note 12, at 1043-47 (discussing educational function of civil rights opinions); Adriaan Lanni, *Protecting Public Rights in Private Arbitration*, 107 Yale L. J. 1157, 1160-61 (1998) (encouraging disclosure of arbitration decisions).

error in interpreting contract). This area must be reevaluated in light of the expansion of imposed arbitration into the civil rights arena.

Review of arbitration awards of statutory claims, as the Court reminds us, must rise to a level "sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232. *See Gilmer*, 500 U.S. at 32 n.4 (same point in context of ADEA). The proper level of review, according to the Court, must be higher in a case reviewing a statutory claim than in one reviewing a garden-variety labor dispute; in the latter case, arbitrators have "authority only to resolve questions of contractual rights." *Id.* at 34. *See, e.g., McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) (rejecting suggestion that arbitration can "provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) ("[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers").

It is widely known that arbitrators often do not apply the law and follow their own precepts of fairness. *See, e.g.* Ware, *supra* note 12, at 719-25 (summarizing empirical research and case law supporting this conclusion); Van Wetzel Stone, *supra* note 12, at 1040 (citing Congressional study that most arbitrators in the securities industry had no background in labor and employment law). Most arbitrators lack legal training, do not keep up with legal developments and lack accountability for their decisions. *See* Edwards, *supra* note 12, at 297-98.

Moreover, the degree of scrutiny that awards presently receive for legal error is feather-light, curtailing even further the incentive to follow the law. Under the FAA, courts may only review legal errors for "manifest disregard of the law." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) (noting "manifest disregard" standard). Manifest disregard focuses not on legal error *per se*, but on the narrower issue of whether the arbitrator deliberately defied the law. Typical is the Eleventh Circuit's recent decision in *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997), holding that reversal of an award for manifest disregard of the law requires proof that the arbitrator was "conscious of the law and deliberately ignore[d] it." *See also Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000) (reaffirming that application of wrong legal test in race discrimination case must be "intentional" or "conscious" to be reviewable as "manifest disregard"). Other circuits apply equally stingy standards of review.[53] If the arbitrator issues no written opinion, or a one-sentence award (and thereby leaves no record of what legal standards were followed), it leaves nothing for the court to review and insulates the award from reversal. Ware, *supra* note 12, at 721 ("[i]n most cases in which an arbitrator does not apply the law, it will be virtually impossible

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[53] *See, e.g., Williams*, 197 F.3d at 761-72 (summarizing law); *Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588, 594 (8th Cir. 1998) (applying deferential "manifest disregard" standard to civil rights case); *DiRussa v. Dean Witter Reynolds Inc.*,121 F.3d 818, 821 (2d Cir. 1997) (applying deferential standard to affirm award that where employee prevailed, but arbitrator awarded no attorneys' fees), *cert. denied*, 522 U.S. 1049 (1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 136 (6th Cir. 1996) ("[a]n arbitration panel only acts in manifest disregard of the law if the applicable legal principle is clear and well-settled and it refuses to follow that legal principle"); *Chisolm v. Kidder, Peabody Asset Mgt., Inc.*, 966 F. Supp. 218, 224-29 (S.D.N.Y. 1997) (rejecting argument for heightened scrutiny of judicial review in civil rights cases).

for a court to discover that the arbitrator did not apply the law"). Standing against this tide is the approach taken by the D.C. Circuit in *Cole*. While noting that courts ordinarily defer to arbitrator's awards, the court held that the manifest disregard standard is somewhat elastic and "must be defined in light of the bases underlying the Court's decisions in *Gilmer*-type cases." *Cole*, 105 F.3d at 1487. As the court noted:

> The nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees' statutory claims. In this context, the Supreme Court has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law. [*Id.* at 1468-69.]

Thus, "there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." *Id.* at 1487. *See Halligan v. Piper Jaffrey Inc.*, 148 F.3d 197, 204 (2d Cir. 1997) (vacating for "manifest disregard" award for employer in civil rights case); *DeGaetano*, 983 F. Supp. at 462-64 (failure to award attorneys' fees to prevailing plaintiff after award was requested was in manifest disregard of the law).

CONCLUSION

For the foregoing reasons, the undersigned *amici* respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC., *Petitioner*,

v.

SAINT CLAIR ADAMS, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
for the NINTH CIRCUIT

BRIEF OF THE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW YORK, NORTH DAKOTA, PENNSYLVANIA, VERMONT, WASHINGTON, AND WEST VIRGINIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act should be interpreted to apply to contracts of employment when such an interpretation will necessarily preempt a significant body of state law intended to protect workers' rights and to promote the public policy of eliminating invidious employment discrimination.

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INTEREST OF THE AMICI CURIAE

The Attorneys General of the amici States have a vital interest in the resolution of this case. As constitutional officers of the States they represent, the Attorneys General have the responsibility to oversee enforcement of employment laws, and particularly employment discrimination laws, within their jurisdictions. Many of the States, either through legislation or in the decisions of their courts, have expressed a public policy based opposition to enforcement of mandatory arbitration agreements where individual statutory employment rights are involved. The States' strong interest in providing public forums to their citizens seeking adjudication of claims involving important statutory rights, particularly in the area of employment discrimination, compels amici to participate in this case.

The States strongly support the use of alternative dispute resolution procedures when there is an extant dispute to be resolved and when both parties voluntarily agree to resolve the dispute via arbitration or some other alternative procedure. Ultimately, however, each State should be permitted to make its own determination regarding the enforceability of mandatory arbitration agreements in the context of employment relations. Interpretation of the Federal Arbitration Act to include contracts of employment would have the effect of preempting a significant body of state law. This would deprive the amici States of their ability effectively to regulate in an important area of traditional state police power.

SUMMARY OF ARGUMENT

Our federal system of dual sovereignty leads to a presumption that Congress does not preempt state law in areas traditionally regulated by the States. To find preemption in

such areas, the Court requires a clear and manifest statement of congressional intent.

The law of employment relations--and particularly employment discrimination law-- is an area of traditional state authority. The States play a vital role in the development of employment discrimination law and they have a vital interest in enforcing their laws in this area. In furtherance of this interest, many States provide low-cost alternative forums for adjudication of employment discrimination claims.

Mandatory preemployment arbitration agreements like the one at issue in this case can frustrate the purposes of state civil rights laws by removing employment-related disputes from public forums and by depriving individual employees of procedural and substantive rights. For this reason, a significant number of States have enacted legislation regulating the enforceability of such agreements. In other States, such agreements have been determined to be unenforceable as a matter of public policy.

Interpretation of the Federal Arbitration Act to reach contracts of employment would have the effect of preempting state law wherever the employer can demonstrate a connection to interstate commerce. This would result in a federalization of employment law which Congress certainly did not intend.

This case raises an additional issue of federalism and comity. The federal district court in this case issued an injunction prohibiting the state court from exercising its jurisdiction. This injunction, unaccompanied by any analysis of the profound policy issues implicated, is an unwarranted derogation of state courts' ability to interpret and enforce the law and constitutes a significant affront to federalism. Interpreting the Federal Arbitration Act to exclude contracts of employment will help to remedy an unfortunate trend in this area.

Petitioner's argument that national uniformity in this area is necessary to avoid local inconsistencies ignores the basic

federal principle that States are authorized to regulate local matters as local conditions warrant. In particular, the States should be free to enact and enforce laws protective of the civil rights of their citizens.

ARGUMENT

INTRODUCTION

The amici States are persuaded by the arguments of Justice Stevens[1/] and by the consensus of legal scholarship [2/] that, in enacting the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in 1925, Congress intended to and did exclude all contracts of employment from its coverage. Respondent and other amici have provided the Court with a thorough

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1. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-43 (1991) (Stevens, J., dissenting.)

2. *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996); Matthew W. Finkin, *Employment Contracts Under the FAA -- Reconsidered*, 48 Labor L.J. 329 (1997). In addition to Professor Finkin's two articles, the Ninth Circuit relied upon articles by nine other commentators in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), including Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv.L.Rev. 591 (1954), reaching or supporting the same conclusion. To these can be added Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1, 19 (1996) and Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U.Pa.L.Rev. 91, 193, n. 438 (1998) ("The federal courts have typically found that the FAA applies to employment disputes despite statutory language that would seem to preclude such coverage.").

recapitulation of the textual analysis and legislative history underlying these opinions. It is not necessary to repeat those arguments here. Rather, this brief addresses important issues of state sovereignty and federalism necessarily implicated in the question before the Court.

The Court's consideration of this question should be informed by the knowledge that an interpretation of the FAA to apply to contracts of employment will seriously impair the States' ability to enact and enforce laws protective of employees by preempting a significant body of state law in an area traditionally within the States' police power. This case also raises serious issues of comity and federalism relating to the propriety of federal court injunctions prohibiting state courts from exercising their jurisdiction in cases raising only state law claims. In the absence of any clear and manifest congressional intent to supersede state law, these considerations should weigh heavily against interpreting the FAA to include contracts of employment.

I. THE PRESUMPTION AGAINST PREEMPTION IN AREAS OF TRADITIONAL STATE POLICE POWER AUTHORITY ARGUES STRONGLY AGAINST INTERPRETING THE FAA TO REACH CONTRACTS OF EMPLOYMENT.

A. Our Federal System of Dual Sovereignty Leads to a Presumption Against Preemption of State Law in Areas Traditionally Regulated by the States in the Absence of an Unambiguous Statement of Congressional Intent.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Within this system, the Federal Government is vested with limited

powers, while the States retain substantial sovereign authority. *Id.*

"This federalist structure of joint sovereigns preserves to the people numerous advantages." *Id.* at 458. Among these are a decentralized government more sensitive to the diverse needs of society, the opportunity for more innovation and experimentation in government, and increased responsiveness of state governments as they compete for a mobile citizenry. *Id.* at 458. This federalist system requires a proper balance between the States and the Federal Government. "In the tension between federal and state power lies the promise of liberty." *Id.* at 459.

These considerations counsel caution in examining federal legislation arguably preemptive of state law in areas of traditional state authority. While "Congress may legislate in areas traditionally regulated by the States" as long as it acts "within the powers granted it under the Constitution," the Court "must assume Congress does not exercise [this power] lightly." *Id.* at 460.

The Court presumes that "Congress does not intend to supplant state law," *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Indeed, in cases "where federal law is said to bar state action in fields of traditional state regulation," the Court operates "on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 655, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

"[T]he preemptive effect of a federal statute is fundamentally a question of congressional intent." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). And "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory,*

501 U.S. at 460, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted).

The Court uses "special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause." *Id.* at 463 n. 1. In this context, the Court "must be absolutely certain" of congressional intent. *Id.* at 464. "[M]ere congressional ambiguity" cannot be allowed to displace state legislation. *Id.* The Court's deference to the principle of dual sovereignty serves to maintain the vital "distinction between what is truly national and what is truly local." *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

B. Employment Law Is An Area of Traditional State Regulation And Preemption Should Not Be Lightly Inferred In This Area.

In our federal system, employment law is clearly within the traditional police power of the States.[3/] This Court has frequently ratified the States' authority to regulate the employment relationship as a valid exercise of the police power. Pertinent examples include *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a Utah statute regulating the employment of miners and mandating an eight-hour day); *St. Louis, Iron Mountain etc. Railway v. Paul*, 173 U.S. 404 (1899) (upholding an Arkansas law requiring that discharged

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3. In this brief, the term "employment law" refers to all labor market regulation other than legal regulation of unions and the collective bargaining process. It includes non-discrimination statutes, wage and hour laws, regulation of workplace safety, and wrongful discharge doctrines. *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L.Rev. 469, 472 n.6 (1993).

railway workers receive back wages); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901) (upholding a Tennessee law requiring that employer scrip for wages be redeemable in cash rather than merchandise); and *McLean v. Arkansas*, 211 U.S. 539 (1909) (upholding an Arkansas law mandating that miners be paid by the weight of coal they mine before it is screened). In 1914, the Court upheld a New York statute requiring that railroads pay their employees semi-monthly and prohibiting employment contracts that would evade or nullify this statutory requirement. *Erie R. Co. v. Williams*, 233 U.S. 685 (1914).

The Commerce Clause does not divest the States of their power to regulate matters of local concern, even when the regulation may have an effect on interstate commerce. *California v. Thompson*, 313 U.S. 109, 113 (1941) (upholding a California statute requiring licensure of transportation agents). In *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), the Court upheld a Colorado statute prohibiting employment discrimination on enumerated bases including race, observing that "the hiring within a State of an employee, even for an interstate job," is a "localized matter." *Id.* at 721.

Discrimination in the workplace is especially a matter suitable for state regulation. The Court has held that statutes addressing workplace discrimination lie solidly within a State's "regulation of its internal affairs." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 95 (1945). Indeed, both Congress and this Court have acknowledged the special role the States have played in the development of employment discrimination law. The text of Title VII, for example, "reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity." *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 283 (1987). As the Court noted in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100-104 (1983), States may extend their

anti-discrimination laws more broadly than federal law; Title VII does not preempt state laws extending broader employment protection.[4/]

In short, in regulation of the employment relationship, "[f]ederal law ... is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal [enactment]." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Hence, because "the establishment of labor standards falls within the traditional police power of the State," "pre-emption should not be lightly inferred in this area." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

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4. In his famous dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932), Justice Brandeis observed: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Nowhere is this argument more apt than in the area of employment discrimination law. Many States, for example, prohibited private-sector disability discrimination before the 1990 passage of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. At least 35 States had some type of official policy concerning family and medical leave prior to enactment of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq*. Drummonds, *supra* note 3, at 490 nn. 112-113.

C. The States Have a Vital Interest in Protection of Workers and Advancement of Public Policy Through Enforcement of Their Employment Laws; This Interest Is Compromised If Employment Discrimination Claims Are Removed From the Jurisdiction of State Courts and State Agencies.

Just as the States play a special role in the development of employment law, and particularly employment discrimination law, so they have a particular interest in guaranteeing their citizens protection of their legal rights and in overseeing the vindication of public policy in this area. These concerns have led, in many States, to the establishment of administrative forums which provide low cost alternatives for adjudication of employment-related claims.

In California, for example, an employee who feels he or she has suffered illegal workplace discrimination can file a complaint with the Department of Fair Employment and Housing, have the matter investigated, have the case conciliated, and, if that fails and the Department considers the complaint meritorious, have the matter decided by the Fair Employment and Housing Commission, all at the State's expense. Cal. Gov. Code, §§ 12900 *et seq*. Similar administrative forums exist for adjudication of wage disputes, unemployment cases, and workers' compensation claims. Cal. Lab. Code, §§ 98 *et seq*., Cal. Unemp. Ins. Code, §§ 1326 *et seq*., Cal. Lab. Code, §§ 5300 *et seq*. Under some preemployment arbitration agreements, these administrative

alternatives to litigation are foreclosed.[5] Nor can an aggrieved employee seek enforcement of statutory rights in state court.

It is evident that use of such binding arbitration agreements is on the increase. In its Petition for Writ of Certiorari, Circuit City stated that it alone employs approximately 60,000 workers potentially subject to such dispute resolution agreements. (Petition for Writ of Certiorari at 13.) Circuit City also refers to "large national employers" "who use the same arbitration agreement for their entire workforce" and to the "many hundreds of thousands of employees"subject to such agreements nationwide. (*Id.* at 10.) Over ten years ago, it was estimated that from eight to ten percent of the entire workforce of the United States was covered by such agreements.[6]

From a public policy perspective, whether this development is salutary or pernicious may be a subject of legitimate debate. Certainly, however, the wholesale removal of statute-based employment claims from public forums and their relegation to private dispute-resolution procedures with no provision for judicial review or public scrutiny raises significant issues particularly pertaining to the enforcement of civil rights laws.

The Equal Employment Opportunity Commission (EEOC) has addressed some of these issues in its policy statement on mandatory arbitration. As the EEOC notes, the

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5. The dispute resolution agreement between Petitioner and Respondent in this case appears to allow individual employees to "file administrative charges" with responsible state agencies. (J.A. at 13, 22.) It is not clear whether employees can actually take employment discrimination charges to an administrative hearing or judicially enforce monetary awards resulting from such administrative proceedings. (*Id.*)

6. *See* the surveys reported in Stone, *Employment Arbitration Under the Federal Arbitration Act* in Employment Dispute Resolution and Worker Rights 57 (IRRA, 1989).

arbitration process is private and allows for little public accountability. Since arbitration decisions are seldom accompanied by written opinions, they do not foster development of the law as the published decisions of courts and administrative agencies do. Arbitration is generally unsuitable for resolution of class actions or pattern and practice claims of discrimination. Procedural protections, such as the right to jury trial and discovery, are often unavailable to the aggrieved employee in arbitration. Arbitration systems also incorporate structural biases which tend to favor the more frequent user of the system. *See* EEOC *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, EEOC Notice Number 915.002, July 10, 1997.

Further problems of fairness can arise when statutorily guaranteed employment rights are consigned to arbitration. These include the inherent advantage employers have in selection of arbitrators, potentially insurmountable financial barriers to the arbitration process for an individual worker, loss of the right to legal counsel, and waiver of rights available under state law, such as a shortening of the statute of limitations and waiver of statutory remedies. Grodin, *supra* note 2, at 42-48.[7]

To some extent, the systemic features which make arbitration a questionable substitute for the courts and administrative agencies in this context are inherent in the nature and history of the arbitration process itself. Arbitration in the United States has generally been "a nonlegal process, often conducted by nonlawyers...." Paul D.

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7. *See also* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems*?: *Repeat Players in ADR*, 15 J. Disp. Resol. 19, 39, 44 (1999), summarizing employment lawyers' criticisms of mandatory agreements to arbitrate statutory employment claims and noting that "repeat players" seem to fare better in certain kinds of employment arbitration.

Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 344 (1996). The arbitrator's task is to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982) (internal citations omitted). The arbitrator's specialized competence is "the law of the shop, not the law of the land," and "the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Id.* Even if qualified to do so, arbitrators have been under "no duty to resolve a dispute in compliance with the parties' legal rights." Carrington, *supra*, at 345. Rather, they tend to seek a resolution "that is equitable, minimizes harm to either party, and enables potential adversaries to maintain a valuable commercial relationship," often by "halving the objects in dispute." *Id.* This predisposition toward compromise rather than scrupulous attention to legal rights, though admirable in the resolution of commercial disputes, may be incompatible with the States' interest in vindication of important public policy objectives through vigorous enforcement of statutory employment rights.

This Court's own opinions reflect a deep skepticism that arbitration is an appropriate mechanism for the vindication of statutory employment rights. In 1967, the Court strongly suggested that it did not then interpret the FAA to apply to any contracts of employment, noting that "categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1." *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 403 n. 9 (1967). *See also* the National Labor Relations Act, 29 U.S.C. § 151, explicitly recognizing the disparity of bargaining power between employers and individual employees.

A few years later, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court considered whether arbitration could provide an adequate substitute for the federal courts in

the vindication of Title VII claims and concluded that it could not. The Court noted first the public policy function implicit in any private Title VII case: "[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.* at 45. Later, the Court commented upon the role of the arbitrator:

> He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. *Id.* at 52-53 n. 16.

Finally, the Court enumerated some of the ways in which arbitral processes are "comparatively inferior to judicial processes in the protection of Title VII rights." *Id.* at 57. These include the arbitrator's lack of expertise in the governing law, the lack of procedural safeguards, and the lack of a comprehensive record. *Id.* at 57-58. These considerations led to the conclusion that "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51.[8/]

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8. More recently, the Court has noted, but has not resolved, the "tension" between *Gardner-Denver* and *Gilmer v. Interstate/Johnson Cane Corp.*, 500 U.S. 20 (1991) (holding that a stockbroker's agreement to arbitrate disputes with his employer as required by the rules of the New York Stock Exchange was enforceable, but explicitly reserving the question whether the FAA excludes "contracts of employment"). *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76 (1998). Amici submit that this tension is attributable, in part, to a natural reluctance to deprive an individual worker of statutorily-guaranteed rights on the strength of a contract whose terms he could not realistically negotiate.

In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), both the majority and the dissenting opinions reflected doubt that arbitration provided an appropriate mechanism for resolution of statutory employment discrimination claims and a conviction that Congress did not intend that such claims would be subject to binding arbitration. As Chief Justice Burger noted:

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

Id. at 750 (Burger, C.J. dissenting).

In a unanimous decision in 1987, the Court said that the presumption in favor of arbitration does not apply to statute-based employment claims. Citing *Barrentine*, along with *Gardner-Denver* and *McDonald v. West Branch*, 466 U.S. 284 (1984), Justice Stevens wrote: "[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Atchison T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 565 (1987), quoting *Barrentine, supra,* at 737 (construing the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, but noting that the underlying theory applies regardless of the particular arbitration statute under review).

Different jurisdictions may choose to address doubts about the appropriateness of arbitration to resolve statute-based claims of individual workers against their employers in a variety of different ways. Under our federal system,

however, the States--in the exercise of their traditional police power authority and with their expertise regarding local conditions--should be permitted to formulate their own individual approaches to this problem.

D. A Significant Number of States Have Addressed These Issues in Statutory Enactments and State Court Decisions; If the FAA is Interpreted to Apply to Contracts of Employment, These State Laws Would Be Subject to Preemption Wherever the Employer Has a Connection to Interstate Commerce.

Many States have already addressed the issues raised by arbitration agreements in employment contracts. Arizona, for example, exempts such contracts from the scope of its arbitration act; the States of Kentucky, Louisiana, Oklahoma, and Wisconsin have similar statutory provisions.[9/] Other States, including Arkansas, Iowa, and Kansas, allow for the enforcement of arbitration agreements between employers and employees generally, but preclude enforcement of agreements to arbitrate future disputes in this context.[10/]

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9. Ariz. Rev. Stat. § 12-1517 (2000) (exempting "arbitration agreements between employers and employees or their respective representatives" from the State's arbitration act); Ky. Rev. Stat. § 417.050 (1998) (same); La. Rev. Stat. §§ 9:4216 (2000) (excluding "contracts of employment of labor"); 15 Okl. St., § 818 (1999) (excluding "employer and employee relations"); and Wis. Stats. § 788.01 (1999) (excluding "contracts between employers and employes, or between employers and associations of employes").

10. Ark. Stat. Ann. § 16-108-201 (1999) (exempting agreements to submit to arbitration "employer-employee disputes" "thereafter arising between the parties" from the State's arbitration act); Iowa Code § 679A.1 (1999) (exempting "[a] contract between employers and employees" "to submit to arbitration a future

Kentucky and South Carolina prohibit imposition of an agreement to arbitrate employment disputes as a condition of employment. Ky. Rev. Stat. § 336.700 (1998); S.C. Code Ann. § 15-48-10 (1999). The arbitration acts of Idaho, Maryland, New Hampshire, and North Carolina each contain a presumption that the act shall not apply to arbitration agreements between employers and employees unless the agreement provides otherwise; in Maryland, New Hampshire, and North Carolina, to be enforceable the agreement must make specific reference to the applicable statute. Idaho Code § 7-901 (1999); Md. Cts. and Jud. Proc. Code Ann. § 3-206 (1999); New Hampshire Rev. Stat. Ann. § 542:1 (1999); N.C. Gen. Stat. § 1-567.2 (1999). In Georgia, an arbitration agreement in a "contract relating to terms and conditions of employment" is not enforceable unless the arbitration clause is initialed by all signatories at the time of the contract's execution. Off. Code Ga. Ann. § 9-9-2 (2000).

In addition, the generally-applicable arbitration law of some States affects the enforceability of pre-dispute agreements to arbitrate employment disputes. For example, the laws of Alabama and Nebraska preclude the enforcement of agreements to arbitrate future disputes.[11] Vermont and a

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controversy"), and Kan. Stat. Ann. § 5-401 (1999) (exempting "contracts between an employer and employees, or their respective representatives" "to submit to arbitration any controversy thereafter arising").

11. Ala. Code § 8-1-41 (2000) (providing that an arbitration agreement cannot be specifically enforced); *Ex Parte Clements*, 587 So.2d 317, 319 (Ala. 1991) ("[u]nless the FAA is applicable, pre-dispute arbitration agreements are void in Alabama as against public policy"); *State v. Nebraska Ass'n of Public Employees*, 239 Neb. 653, 477 N.W.2d 577, (1991) (holding the Nebraska Uniform Arbitration Act violates the Nebraska Constitution to the extent it requires enforcement of agreements to arbitrate future disputes).

number of other States have imposed procedural prerequisites aimed at assuring notice and consent for the enforcement of any arbitration agreement.[12] In the absence of preemptive federal law, these statutory safeguards would be applied to contracts of employment.

In several States, the courts have addressed these issues. The courts of Iowa, Minnesota, New York, and West Virginia, for example, have held that contracts to arbitrate employment discrimination claims violate the States' public policy and are, therefore, unenforceable.[13]

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12. *See* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 403-404 (1992), and Grodin, *supra* note 2, at 18.

13. *Polk County v. Civil Rights Com'n*, 468 N.W.2d 811, 816 (Iowa 1991) ("[T]he arbitration of civil rights violations is against public policy."); *Correll v. Distinctive Dental Services, P.A.*, 607 N.W.2d 440 (Minn. 2000) (where the FAA does not preempt state law, the Minnesota Human Rights Act provides the exclusive method of resolving employment discrimination claims under the Act and voids arbitration agreements purporting to waive the right to a judicial forum); *Wertheim & Co. v. Halpert*, 48 N.Y.2d 681, 397 N.E.2d 386, 387, 421 N.Y.S.2d 876 (1979) ("Although arbitration is a favored method of dispute resolution, arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced."); and *Copley v. NCR Corp.*, 183 W.Va. 152, 394 S.E.2d 751, 756 (1990)("[U]nder West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to [state statute]."). *See also Steck v. Smith Barney, Harris Upham & Co., Inc.*, 661 F.Supp. 543, 548 (D.N.J. 1987) (suggesting that the New Jersey Supreme Court would read that State's Law Against Discrimination as precluding arbitration of employment discrimination claims and, in the absence of the FAA, an agreement to arbitrate such claims would be unenforceable under state law.) *But see Alamo Rent A*

Michigan and California have taken a different approach. In Michigan, pre-dispute agreements to arbitrate employment discrimination claims are enforceable, but only so long as "the employee does not waive any rights or remedies under the statute and the arbitral process is fair." *Rembert v. Ryan's Steak Houses*, 596 N.W.2d 208, 230 (Mich.App. 1999). Among other things, the *Rembert* decision requires that the employee have clear notice of the agreement to arbitrate and requires that the arbitration process provide the right to legal counsel, reasonable discovery, a fair hearing, and a neutral arbitrator. In addition, the arbitration decision must be in writing and must contain findings of fact and conclusions of law and the prevailing employee is entitled to attorney fees. *Id.*

The California Supreme Court recently held a pre-employment agreement to arbitrate employment discrimination claims unenforceable on the grounds that it violated public policy and was unconscionably unilateral. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, ___ Cal. 4th ___, ___ P. 2d ___, ___ Cal. Rptr.2d ___, 2000 Cal. LEXIS 6120, No. S075942 (August 24, 2000), the court held that such agreements may be valid and enforceable, but only if they incorporate substantive and procedural protections. Specifically, they must allow for recovery of all types of relief otherwise available in court. They must also provide for neutral arbitrators, adequate discovery, and written arbitration awards. The agreement may not require the employee to pay "either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Id.*, slip opinion at 18.) Finally, the agreement must evidence "a

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Car, Inc. v. Galarza, 306 N.J. Super. 384, 703 A.2d 961, 964 (N.J. Super.A.D. 1997) (holding that the Law Against Discrimination does not preclude enforcement of agreements to arbitrate employment discrimination claims but declining to enforce such an agreement on other grounds).

modicum of bilaterality," (*id.* at 39), that is, the employee cannot be bound to submit his claims to arbitration if the employer is free to litigate its claims in court.[14]

If the FAA is interpreted to apply to contracts of employment, it will necessarily preempt all the state statutes cited above whenever the employment relationship is subject to an arbitration agreement and the employer can show a connection to interstate commerce. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the FAA, but "state laws applicable *only* to arbitration provisions" are preempted.) (Emphasis in original.) In addition, it will call into question most or all of the state court decisions holding such agreements unenforceable as a matter of public policy. This will have the effect of nullifying most state law already in place limiting the enforceability of arbitration agreements in the employment context and of stifling further development of state law in this important area.

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14. The dispute resolution agreement at issue in this case appears to be unilateral, binding upon the employee but not upon Circuit City. (J.A. at 21-22.) Its damages limitations appear inconsistent with the provisions of the State's employment discrimination law. (*See* J.A. at 35-36, *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211, 221, 649 P.2d 912, 185 Cal. Rptr. 270 (1982), and Cal. Gov. Code § 12970.) In addition, the agreement provides that the employee "shall pay one-half of the costs of arbitration" unless he prevails, in which case the arbitrator "may require that Circuit City pay the [employee's] share of the costs." (J.A. at 33-34.) On the other hand, if Circuit City prevails, the employee may be required to pay *all* costs of arbitration. (*Id.*) On these bases, this agreement would probably be held unenforceable under California law.

At one stroke, the carefully crafted individualized approaches the States have taken to this issue would be supplanted by a "federal common law" of employment. Yet Congress has never undertaken to address the difficult issues of public policy inherent in the enforcement of arbitration agreements between employers and their individual employees. Consequently, once the States are divested of their authority to enact protective legislation in this area, there will be a void in the law, with little but an inapposite presumption in favor of arbitration to guide the courts.

E. The FAA Does Not Reflect the Requisite Congressional Intent to Preempt State Law In This Area.

Neither the text nor the legislative history of the FAA evidence the clear and manifest intent required to preempt state authority in this vital area. Certainly, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences v. Leland Stanford Jr. U.* 489 U.S. 468, 477 (1989). "More importantly, the legislative history of the FAA reveals no indication that Congress intended to supplant state arbitration law nor even an awareness that state law would be affected." Strickland, *supra* note 12, at 454 n. 345.

The consensus of legal scholarship is that the exclusion of section 1 of the FAA was intended to encompass all contracts of employment. Even those who favor extending the FAA to cover most employment contracts acknowledge

light of the caveat that congressional ambiguity should not be construed as expressing an intent to preempt state law in traditional areas of state regulation, the amici States urge the Court to interpret the FAA to exclude contracts of employment.

II. THIS CASE ILLUSTRATES A SECOND SIGNIFICANT ISSUE OF CONCERN TO THE STATES: THE INCREASING TENDENCY OF FEDERAL COURTS TO ISSUE UNWARRANTED INJUNCTIONS AGAINST STATE COURTS, SUPPOSEDLY IN FURTHERANCE OF THE FAA'S POLICY TO ENCOURAGE ARBITRATION.

One aspect of the FAA's potential "federalization" of employment law warrants additional discussion. In this case, the federal district court enjoined a state court from exercising its jurisdiction. This injunction was accompanied by virtually no analysis and relied solely upon the authority of the FAA. This constitutes a serious affront to comity and the principles of cooperative federalism and illustrates another derogation of state sovereignty which would be avoided--at least in employment cases--by properly interpreting the FAA to exclude contracts of employment.

In this case, a California citizen filed an action against Circuit City and three Circuit City employees in California superior court on November 26, 1997. (J.A. at 10.) The suit was based upon California's Fair Employment and Housing Act (FEHA), Cal. Govt. Code §§ 12900 *et seq.*, and on state

of action. There was no basis for federal jurisdiction over the case.[17]

Circuit City did not seek to remove the case to federal court. Instead, relying upon an assertion of diversity of citizenship between itself (but not the other defendants) and the plaintiff, it filed a Petition to Stay State Court Action and to Compel Arbitration in United States District Court. The district court granted this petition and, on April 29, 1998, with virtually no discussion or analysis of the issues involved, issued an order staying the proceedings in the California state court action pending completion of the arbitration of plaintiff's dispute with defendants. (J.A. at 43-45.) This injunction, purporting to suspend the authority of a court of the sovereign State of California to exercise its jurisdiction over a case properly filed before it and in which the plaintiff asserted only state law claims, raises fundamental concerns of comity and federalism.

Our system of federalism reflects a general policy under which state court proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme] Court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988)(quoting *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970)). As the Court has repeatedly enunciated, American jurisprudence assumes that state courts can be relied upon to enforce federal laws and policies. *See, e.g.*, *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S.

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17. "The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction .... [E]nforcement of the Act is left in large part to the state courts ...." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (emphasis added).

511, 518 (1955) (attesting to Congress's confidence in the state courts to enforce federal law).

When a federal court enjoins the exercise of a state court's jurisdiction, it seriously "disparages state courts' capacity for fairness." Sternlight, *supra* note 2, at 101. "Such injunctions, through which a federal entity completely shuts down the actions of a state court, may be seen as a direct threat to comity and federalism." *Id.* at 93.

Issuance of a federal injunction against a state court requires, at a minimum, careful consideration of the All Writs Act, 28 U.S.C. §1651(a), traditional equitable principles, the Anti-Injunction Act, 28 U.S.C. §2283, and various absention doctrines, each of which is extremely complex. *Id.* at 96. Yet, the federal district courts have been issuing such injunctions on the theory that they are necessary to effectuate the purposes of the FAA "without considering many of the statutes and doctrines that are directly on point." *Id.* at 97. As Professor Sternlight observes, almost none of the reported decisions examine the important policy questions raised by these cases; instead, they consist primarily of citations to earlier cases, themselves lacking in analysis. *Id.* at 98.

That characterization is unfortunately apt in this case. Here, after a cursory reference to the Anti-Injunction Act and an equally cursory reference to two of the cases Professor Sternlight cites as examples of the federal courts' failure of analysis,[18] the district court issued a stay enjoining the California superior court from any further activity in

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18. *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F.Supp. 488, 495 (N.D. Ga. 1988) and *Network Cinema Corp. v. Glassburn*, 357 F.Supp. 169, 172 (S.D. N.Y. 1973), cited in Sternlight, *supra*, at 97 n. 36. The court also made glancing reference to *"Circuit City v. Gonzales,"* evidently an unpublished decision of the United States District Court for the Eastern District of California. (J.A. at 51.) It merits noting that neither *Williams* nor *Network Cinema* is an employment case.

plaintiff's case. (J.A. at 50-51.) The district court appeared to believe that its injunction against the state court was authorized by *Moses H. Cone Hospital*, but that case does not support the proposition that federal courts may enjoin state courts from exercising their jurisdiction, even when the FAA is properly invoked.

In *Moses H. Cone Hospital*, the Court explicitly reserved the question "whether a federal court might stay a state-court suit pending arbitration under [the Anti-Injunction Act,] 28 U.S.C. 2283," recognizing that such an injunction would raise questions of federalism and comity that were not raised in that case. *Moses H. Cone Hospital,* 460 U.S. at 25 n. 32.[19] The Court has never revisited the issue.

In the years since *Moses H. Cone Hospital*, the Court has often made it clear that state courts, as well as federal courts, are obligated to enforce the provisions of the FAA. *See, e.g.*, *Southland Corp. v. Keating,* 465 U.S. 1, 10-16 (1984) (reversing a California court's refusal to compel arbitration under the FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269-70 (1995) (holding that an Alabama court erred in declining to enforce an arbitration agreement in a local contract); and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (reversing the Montana Supreme Court's decision that the trial courts of Montana need not

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19. In *Moses H. Cone Hospital*, the question was whether the United States District Court had erred in staying its own proceedings in favor of a prior-filed North Carolina state-court action arguably subject to the FAA. The Court ruled that, under the specific facts of the case, the district court ought to have issued an order to arbitrate the dispute between two of the contestants under section 4 of the FAA. The federal court's authority to stay state court proceedings pending the outcome of arbitration was not discussed or decided.

enforce arbitration agreements under the FAA if they do not comport with the procedural requirements of Montana's statutes). At this point, it seems well established that state courts have the same obligation to enforce the stay provisions of the FAA, where it applies, as do federal courts. Sternlight, *supra*, at 111. Hence, the concern expressed in *Moses H. Cone Hospital* regarding "the probable inadequacy of the state-court proceeding" to protect the rights of the party invoking the FAA (460 U.S. at 26) appears to have significantly diminished. Under these circumstances, *Moses H. Cone Hospital* cannot be interpreted to sanction the issuance of the injunction in this case.

As noted previously, the present case is emblematic of a disturbing trend. Federal courts "have been far too willing to grant such injunctions" against state courts under the supposed authority of the FAA. Sternlight, *supra,* at 198. When they do so without carefully considering the full array of policies and doctrines implicated, they "use the force of federal supremacy to subordinate state interests" and damage the relationship between federal and state courts. *Id.* at 203.

Amici States respectfully request that the Court take this trend into account in its consideration of this case. Interpreting the FAA not to apply to contracts of employment will not entirely resolve the problem, but it will direct a significant class of cases away from the hazards Professor Sternlight identifies. Congress assuredly did not intend that the FAA would become a juggernaut for eliminating state court jurisdiction over employment disputes. By eliminating the current uncertainty regarding the scope of the statute and clarifying that it does not apply to employment disputes, the Court can significantly ameliorate a situation seriously at odds with the principles of comity and federalism.

III. PETITIONER'S ARGUMENT FOR A NATIONALIZATION OF EMPLOYMENT LAW IS INCONGRUENT WITH OUR SYSTEM OF FEDERALISM.

Petitioner and several of the amici supporting its position argue that it is "anomalous" that "[a]n employer operating in several states and utilizing uniform procedures and a standardized arbitration agreement with its employees nationwide may find that the agreement is enforceable in some states but not in others...." (Brief for Petitioner at 34.) One amicus observes that state law is "quite literally, 'all over the map'" in regard to employment arbitrations. (Brief of Amicus Curiae the Council for Employment Law Equity In Support of the Petitioner at 14.) Some amici further argue that the Ninth Circuit's decision constitutes "[a] dangerous threat" to a "worthwhile employment practice," advantageous to employees and employers alike. (*Id.* at 2-3.) These arguments ignore our system of federalism and are ultimately unpersuasive.

First, the amici States are aware of no state law that prohibits employers and employees from voluntarily submitting their disputes to arbitration or to any other alternative dispute resolution process they choose. If arbitration is indeed fair and advantageous to employees, employees will readily submit their claims to arbitration. The state statutes and decisions cited in this brief address only the circumstance where one party no longer believes arbitration will be appropriate or equitable and the other party seeks to compel arbitration via the judicial process. Under these circumstances, some States have determined that, for reasons of public policy, some employer-employee arbitration agreements are unenforceable under some circumstances.

Second, the fact that the States have decided these issues differently properly reflects the fact that, under the Tenth Amendment, the States are free to take local conditions and

preferences into account in developing their laws. Regional differences will appropriately give rise to variations in employment law. This is an integral facet of our system of dual sovereignty. As Chief Justice Burger observed: "Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones." *EEOC v. Wyoming*, 460 U.S. 226, 264 (1983) (Burger, C.J., dissenting).

The FAA reflects no congressional intent to nationalize employment law. There is nothing unfair or inequitable in requiring employers who choose to do business in several States to abide by the laws each of those States enacts to protect its citizens. Petitioner and its amici seem to argue for a system in which the States may be divested of their traditional role in regulating conditions in the workplace. Under that system, employees' rights would no longer be protected by state legislatures and by the decisions of state appellate courts; instead, the rights and duties of the employment relationship would be determined by arbitration agreements drafted by corporate attorneys and made enforceable by federal law.

Congress has not made this policy decision. Heretofore, each State's authority to protect employment rights within its own jurisdiction has not been questioned. Amici States urge the Court to interpret the FAA to harmonize with, rather than to overturn, this integral feature of our constitutional system.

CONCLUSION

For the foregoing reasons, the amici States respectfully request that the decision of the Court of Appeals be affirmed.

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No. 99-1379

IN THE
SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

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No. 99-1379

IN THE

SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

AARP is a nonprofit membership organization of more than thirty-four million people age 50 or older that is dedicated to addressing the needs and interests of Americans over the age of 50. One of AARP's primary objectives is to achieve dignity and equality in the work place through

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, encourage employers to hire and to retain older workers, and help workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect their rights and to preserve the legal means to enforce them.

More than forty percent of AARP's members, most of whom are protected by the Age Discrimination in Employment Act (ADEA) and other federal and state laws prohibiting employment discrimination, remain active in the work force. The proper interpretation and application of these statutes are of paramount importance to the millions[2/] of older workers who rely on them to remedy invidious bias in the work place. Mandatory, pre-dispute arbitration provisions in employment contracts, such as the one at issue in this case, threaten the protection afforded workers under the ADEA and other federal civil rights laws and undermine the enforcement system Congress designed to eliminate employment discrimination in society. Workers should not be forced to decide between their jobs and enforcement of their statutory rights, the stark choice presented by mandatory arbitration agreements. If arbitration is to occur it should be post-dispute and voluntary. In this way employees will have a true choice of forum for resolving employment discrimination claims that is consistent with both the letter and the spirit of the nation's antidiscrimination laws. For these reasons, AARP files this brief *amicus curiae* urging the Court to affirm the decision of the court below holding that the Federal Arbitration Act (FAA) does not apply to employment disputes.

2/ "As of 1995, approximately 41 million members of the nation's civilian workforce were age 45 or older." Marc Bendick, et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, Journal of Aging & Social Policy, Vol. 10(4) 1999, at 20, (citation omitted).

SUMMARY OF ARGUMENT

The legislative history of the FAA could not be clearer: The FAA was not intended to apply to arbitration clauses in employment contracts. The reason for this exclusion is that the equality of bargaining power presumed to exist between the parties to the commercial contracts to which the FAA was intended to apply is totally lacking in the employer-employee relationship outside of the collective bargaining arena. The inequality of bargaining power between employer and employee vitiates any voluntariness on the part of the employee who, as a practical matter, is forced to arbitrate statutory claims under the civil rights laws or forfeit the job. The "take it or leave it" nature of such agreements denies employees a forum in which they will be able to fully vindicate their statutory rights.

ARGUMENT

The first section of the FAA states:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. §1. Although *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), upheld a provision that required arbitration of a claim under the ADEA, the court made it clear that it was not addressing the question presented here, *i.e.*, the applicability of the FAA to employment contracts containing such provisions. The *Gilmer* court refused to consider the question because the arbitration provision at issue was not in a contract of employment, but in Gilmer's securities registration application. *Id.* at 25 n. 2; *see Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 397 n.

2 (1998).[3] In his dissent in *Gilmer*, Justice Stevens concluded that the language of section 1 of the FAA meant that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA ...." 500 U.S. at 36 (Stevens, J., dissenting).[4] Justice Frankfurter reached a similar conclusion: "[w]hen Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting).

The legislative history expressly supports this construction. At the Senate Judiciary Subcommittee hearings on the bill which eventually became the FAA, the chair of the American Bar Association committee responsible for drafting the bill stated that it was not intended to "be an act referring to labor disputes at all. It is purely an act to give the

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[3] 500 U.S. at 25 n.2 As pointed out in *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), the Securities and Exchange Commission (SEC) approved changes to both the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) arbitration rules considered in *Gilmer*. Under the amendments, statutory employment-related discrimination claims are arbitrable only if the parties agree to arbitration *after* the dispute has arisen; absent such agreement, however, arbitration of such claims is not compulsory. The NASD rule change went into effect on January 1, 1999. *See* SEC Rel. No. 34-40109, 63 Fed.Reg. 35299, 1998 WL 339422. The NYSE rule change was approved by the SEC on December 29, 1998. *See* SEC Rel. No. 34-40858, 64 Fed.Reg. 1051, 1999 WL 3315.

[4] *See* Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 Hofstra Lab. & Employment L.J. 345, 365 (Spring 1998) ("On the whole, Justice Stevens ... and federal district courts like the court in *Arce* [*v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117 (N.D. Miss. 1995)], would seem to have the better argument: that the Federal Arbitration Act was not meant to cover contracts of employment.")

merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) (hereinafter "Senate Hearing"), at 9, quoted in *Gilmer*, 500 U.S. at 539 (Stevens, J., dissenting).

At that same hearing, Senator Walsh stated:

> The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate Hearing, at 9.

After analyzing Congress' intent in enacting the FAA by examining the "historical context" of the phrase "engaged in ... interstate commerce," the Ninth Circuit concluded that section 1 of the FAA "was clearly intended to exempt *all* employment contracts over which Congress had interstate commerce power." *Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1202-03 (9th Cir. 1998). While the other circuits have concluded for other reasons that the FAA does apply to employment disputes, it is clear that at the time of the enactment of the FAA, no one envisioned the use of dispute

resolution clauses mandating arbitration to strip essentially powerless workers of rights that were enacted for their protection.

Moreover, the Court's conclusion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum," presupposes both the *voluntary* agreement of the party to arbitrate claims and the ability to fully vindicate statutory rights in this forum. Where "agreements" to arbitrate are conditions of employment, it is clear that neither condition is satisfied.

I. PRE-DISPUTE AGREEMENTS TO ARBITRATE ARE NOT VOLUNTARY.

This nation's entire body of labor law has been created in response to the inequality of bargaining power between employers and individual employees. For example, in the National Labor Relations Act, at 29 U.S.C. §151 (NLRA), Congress proclaimed that the purpose of the statute is to "restor[e] equality of bargaining power between employers and employees." In the Norris-La Guardia Act, at 29 U.S.C. §102, Congress declared that because "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment," it is the public policy of the United States that "he shall be free from the interference, restraint, or coercion of, employers of labor." In its deliberations regarding the adoption of the protections relating to workers' waivers of rights and claims which were eventually enacted in the Older Workers Benefit Protection Act of 1990 (OWBPA), codified at 29 U.S.C. § 626(f)(1)(A-H), "[c]ongress recognized the significant inequalities in bargaining power that exist between employers and employees ...." S. Rep. 101-79, 101st Cong., 1st Sess. 4 (1989). In the OWBPA context, as in the NLRA, Norris - LaGuardia Act, and FAA, Congress was concerned about the employer's coercion of the individual worker. "The

Committee's major concern in this regard is that early retirees or employees being offered the chance to participate in exit incentive or other group termination programs can effectively be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver." *Id.* at 9.

California, where this case arose, has similarly acknowledged the inability of individual employees to bargain on an equal basis with employers:

> [T]he public policy of this State is declared as follows: Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, *the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment* ....

Cal. Lab. Code § 923 (emphasis added).

The Court has similarly acknowledged the inherent inequality between employees and employers as a fundamental underpinning of the employment statutes. Finding that a waiver of rights under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), was contrary to public policy, the Court concluded that "employers might be able to use superior bargaining power to coerce employees to ... waive their protections under the Act." *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985). Justice O'Connor shared this concern in the case of a state statute intended to protect employees "from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system

for redress of an employment grievance." *Perry v. Thomas*, 482 U.S. 483, 495 (1987) (O'Connor, J., dissenting). In *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 844 (1998), the Court acknowledged that the OWBPA "reflects concern about the conditions (of knowledge and free choice) surrounding the making of a contract to waive an age discrimination claim."

Given this legislatively and judicially recognized lack of bargaining power on the part of individual employees like Respondent Adams, and the concomitant opportunity for coercion on the part of the employer, it cannot be seriously maintained that the employee's "agreement" to a predispute arbitration clause is voluntary in the sense of the free assent required for a valid waiver of statutory rights.

In the employment context, it is, indeed, a "false assumption" that if the worker rejects the proffered arbitration clause, "another employer would offer a worker a job where his or her statutory rights would be enforceable . . . ." Paul D. Carrington, *The Dark Side of Contract Law*, Trial, May 2000, at 73, 74. This false assumption operates with particular force in the case of an older worker[5/] who has lost a job and who has finally obtained an interview for another job after searching much longer than his younger counter parts.[6/] Given the older applicant's lower probability of successfully obtaining a job comparable to his former

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[5/] A person age forty or older protected by the ADEA, 29 U.S.C. § 621 *et seq*.

[6/] *Time* Magazine reported that most older workers who are replaced by younger people willing to work for less money "eventually find some kind of new employment. Trouble is, they have to search long and hard, and then they must often settle for low-paid, low-skilled work." "Time Select Careers: Unmasking Age Bias," at 3, *Time*, Sept. 7, 1998. One study found that in Philadelphia in 1994 it took people 50 and older an average of 25 weeks to find a new job, compared to 18 weeks for people under 40. *Money*, July 1996, at 121.

position,[7/] it is completely unrealistic to expect that he would turn down a job because the employer conditioned it on his accepting mandatory arbitration of all statutory claims that might arise. To the contrary, when confronted with the employer's proclamation of arbitration as a condition of employment, the only realistic choice for the older employee or applicant is to accept the arbitration clause or lose the job.

The National Academy of Arbitrators, the nation's leading professional organization of labor-management arbitrators, while strongly supporting arbitration in the collective bargaining context, has condemned the concept of mandatory pre-dispute arbitration agreements for individual workers.

In 1997, the Academy passed a resolution stating: "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for pursuit of statutory rights." National Academy of Arbitrators (NAA) Statement of Guidelines (May 21, 1997) 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997). According to the president of the NAA, the business of arbitrators is fairness "and the absence of fairness, wherever it occurs, should be our concern." *Id*. In connection with the issuance of the Guidelines, the former president of the NAA pointed out that arbitrators are accustomed to a system involving parties of equal power and that mandating arbitration as a condition of employment is "not as fair" as traditional, [*i.e.*, truly voluntary post dispute] arbitration. *Id*.

In 1991, after the *Gilmer* decision, Congress passed the Civil Rights Act of 1991 (CRA), which, *inter alia*, expressly gave employees the right to a jury trial in discrimination claims brought under Title VII. 42 U.S.C. §1981a(c).

[7/] In discussing the "unfair and abusive waiver practices" that led to the adoption of the OWBPA, Congress found that "once out of work, these older Americans have less than a 50/50 chance of ever finding new employment." S. Rep. 101-79, 101st Cong., 1st Sess. 4 (1989).

Although the CRA encouraged the use of all forms of alternate dispute resolution, as explained by Representative Edwards, "The section contemplates the use of *voluntary* arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees in advance to forego statutory rights." 137 Cong. Rec. H9526 (Daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (emphasis added).

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the nation's employment laws, has issued an extensive policy statement condemning mandatory arbitration of civil rights claims. At the same time, the EEOC reaffirmed its support for *voluntary* arbitration and other alternative approaches to resolve employment discrimination disputes. EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 133 Daily Lab. Rep (BNA) E-4, July 11, 1997) [hereinafter EEOC Policy Statement]. This Court traditionally gives "great deference" to the EEOC's interpretation of the civil rights laws enforcing employee rights. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).[8/]

In the EEOC Policy Statement, the agency stated that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced" in the "nation's employment discrimination laws." 133 Daily Lab. Rep. (BNA) E-4, July 11, 1997.

[8/] *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999), does not affect the deferential consideration traditionally afforded EEOC policies, since in that case the Court found no need to address the question of what deference is due such agency determinations. *Id.*, at 2145.

The Commission further found that:

> The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, *when imposed as a condition of employment, it is structurally biased against applicants and employees*.

Id. at E-7 (emphasis added). Further, "[t]he terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate." *Id.* Such "agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power." *Id.*

The EEOC Policy Statement concluded:

> The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. *Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws*.

Id. at E-9 (emphasis added).

Chief Justice Burger reached the same conclusion sixteen years before the EEOC Policy Statement:

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

Barrrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

In summary, it is quite clear that the drafters of the FAA and the Congress that enacted it did not intend for it to apply to employment disputes. The reason for excepting employment disputes from the coverage of the FAA, the unequal bargaining power of employers and employees with its potential for coercion and abuse of the weaker party by the stronger, is at least as valid today as it was at the time of the FAA's enactment. Allowing employers who seek to exploit their power over the work place unilaterally to impose mandatory arbitration in all employment disputes is not only bad law, but bad public policy as well.

II. MANDATORY ARBITRATION IS INCOMPATIBLE WITH THE FULL ENFORCEMENT OF THE EMPLOYMENT DISCRIMINATION LAWS.

In *Gilmer*, this Court decried "generalized attacks on arbitration" that "'res[t] on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants.'" 500 U.S. at 30, quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989). This criticism has been squarely answered by the EEOC Policy Statement, which unequivocally concludes: "Mandatory arbitration of

employment discrimination disputes 'privatizes' enforcement of the federal employment discrimination laws, thus undermining public enforcement of the laws." 133 Daily Lab. Rep. (BNA) July 11, 1997, at E-7. The EEOC determined that "[e]ven the fairest of arbitral mechanisms will differ significantly from the judicial forum." *Id.*

In *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352,358-59 (1995), the Court emphasized the importance of public accountability to the enforcement of the civil rights laws:

> The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the ADEA's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.

In stark contrast, in mandatory arbitration there is little public accountability because the "public plays no role in an arbitrator's selection; s/he is hired by the parties" and "the arbitrator's authority is defined and conferred, not by public law, but by private agreement." *Id.* Indeed, an arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

The EEOC determined that arbitration does not allow for development of the law because there may be no requirement for a written decision, the decisions are not made public without the consent of the parties, and judicial review

of arbitral decisions is severely limited, leaving "higher courts and Congress unable to act to correct errors in statutory interpretation. *The risks for the vigorous enforcement of the civil rights laws is profound.*" 133 Daily Lab. Rep. at E-7, July 11, 1997 (emphasis added).

The EEOC also described other aspects of arbitration that limit claimants' rights in important respects, including the unavailability of a jury trial, significantly limited discovery, and the unsuitability of arbitration for resolving class or pattern or practice discrimination claims.[9/] *Id.* Mandatory arbitration "may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader - and more accurate - view of the employer's conduct." *Id.* In addition, unlike a judicial proceeding, "results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator." *Id.* Finally, "unlike voluntary post-dispute arbitration - which must be fair enough

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[9/] Mandatory arbitration agreements in recent years have included, for example, the following elements: (1) the reservation of the right to change the rules without any obligation to notify, much less receive consent from the employee, (*Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000)); (2) failure to state that statutory claims were included in the agreement to arbitrate, (*Brown v. ITT Consumer Financial Corp.*, 211 F. 3d 1217 (11th Cir. 2000)); *Haskins v. Prudential Insurance Co. of America*, 2000 WL 1209274 (6th Cir. Aug. 28, 2000), (3) a limitation on the damages an employee may recover, *i.e.*, no tort damages, or no punitive damages (*Paladino v. Avnet Computer*, 134 F.3d 1054 (11th Cir. 1998)); *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999), (4) limitations on the discovery available prior to the arbitration, which inevitably works to the disadvantage of the plaintiff (*Id.*); (5) controlling the panel of arbitrators (*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999)); (6) shortening the statute of limitations (*Graham Oil v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994)); and (7) forbidding the arbitrator from awarding attorneys fees or costs, regardless of whether statutes provide such remedies to prevailing plaintiffs (*Paladino, Hooters of America, Graham Oil*).

to be attractive to the employee - the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit." *Id.*

The EEOC Policy Statement pointed out that the agency's conclusions were consistent with the analysis of the Presidential Commission on the Future of Worker-Management Relations, otherwise known as the Dunlop Commission. *Id.* In its December 1994 "Report and Recommendations," the Dunlop Commission expressed concern about

> the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment.

Presidential Commission on the Future of Worker-Management Relations: Report and Recommendations, pp. 28-29, (December 1994). Given this concern, the Dunlop Commission formally recommended that "binding arbitration agreements should not be enforceable as a condition of employment." *Id.* at 34-35.

Based in part on concerns similar to those expressed by the EEOC and the Dunlop Commission, both the National Association of Securities Dealers and the New York Stock Exchange have amended their rules to except statutory employment discrimination claims from mandatory arbitration. *See* note 3 *infra*. Pursuant to the rule changes, such claims are arbitrable only if the parties agree to arbitration *after* a dispute has arisen.[10/]

[10/] *See* note 3 *infra*.

This Court has also concluded that

> [t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'

Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974), quoting *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring). Additionally, "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII" because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Id.* at 56-57.

CONCLUSION

The legislative history of the FAA strongly supports the conclusion that Congress intended to exempt employment disputes from mandatory arbitration. While post-dispute agreements to arbitrate may be truly voluntary, the "consent" of individual workers to so-called "voluntary" pre-dispute agreements to arbitrate statutory claims is vitiated by the coercive nature of the employer-employee relationship, which is characterized by the unequal bargaining power of the parties. The arbitral process, by its nature, is generally not a forum in which employees are able to fully vindicate their statutory rights. Due to the widely recognized inadequacies of mandatory arbitration for the adjudication of statutory employment discrimination claims, the process has been abandoned by the very industry in which it was approved by this Court in *Gilmer*. For these reasons, *amicus curiae* AARP urges the Court to confirm the congressional intent underlying the FAA by holding that it does not compel arbitration of employment disputes.

September 19, 2000

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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL JOINT APPENDIX
(Corrected Circuit City Dispute Resolution Rules and Procedures)

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2400

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The Joint Appendix filed in this case contained errors in the Circuit City Dispute Resolution Rules and Procedures. Though the Rules and Procedures were substantively correct as they appeared in the Joint Appendix, some of them were inadvertently misnumbered. To avoid any confusion, we are reproducing in this Supplemental Joint Appendix the Rules and Procedures in their entirety, with correct numerical designations restored and other minor typographical errors corrected. As the parties made references to these Joint Appendix pages in briefing, the page numbering herein corresponds with the page numbering in the original Joint Appendix.

Exhibit C [to Declaration of Pamela G. Parsons]

CIRCUIT

CITY

Dispute Resolution

Rules and Procedures

All Applicants
March 1995

Dear Circuit City Applicant:

Thank you for considering employment with Circuit City. Circuit City has enjoyed tremendous success and growth over the past several years. Our associates have played an integral role in our success, and Circuit City works very hard to treat all applicants and associates fairly and with respect.

As you read through our employment application, you will note that Circuit City has implemented an arbitration procedure to provide quick, fair, final and binding resolution of employment-related legal claims. If you have signed Circuit City's Dispute Resolution Agreement and then wish to withdraw your consent, you must do so within three (3) days. Please notify Circuit City's Applicant Screening Department in writing (including your Social Security number and the name of the place at which you applied for employment) that you no longer desire for Circuit City to consider your application for employment. The address for the Applicant Screening Department is:

Circuit City Stores, Inc.
Applicant Screening Department
9960 Mayland Drive
Richmond, VA 23233

We appreciate your interest in Circuit City and hope you decide to start the application process by signing the Dispute Resolution Agreement and completing the employment application.

CIRCUIT CITY DISPUTE RESOLUTION RULES AND PROCEDURES

Rule 1. PURPOSE

Circuit City (the Company) has established an employment dispute resolution procedure, culminating in formal arbitration, designed to provide Associates with a fair, private, exclusive, expeditious, final and binding means for resolving legal disputes arising out of, or relating to, their employment with Circuit City, without the need for litigation in federal, state or local courts. These Dispute Resolution Rules and Procedures govern arbitrations held pursuant to the Circuit City Dispute Resolution Agreement.

Rule 2. CLAIMS SUBJECT TO ARBITRATION

Except as otherwise limited herein, any and all employment-related legal disputes, controversies or claims of an Associate arising out of, or relating to, an Associate's application or candidacy for employment, employment or cessation of employment with Circuit City or one of its affiliates shall be settled exclusively by final and binding arbitration before a neutral, third-party Arbitrator selected in accordance with these Dispute Resolution Rules and Procedures. Arbitration shall apply to any and all such disputes, controversies or claims whether asserted against the Company and/or against any employee, officer, alleged agent, director or affiliate company.

All previously unasserted Associate claims arising under federal, state or local statutory or common law shall be subject to arbitration. Merely by way of example, these claims include, but are not limited to, claims arising under the

Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, as amended, including the amendments of the Civil Rights Act of 1991, the Employee Polygraph Protection Act, the Employee Retirement Income Security Act (ERISA), the National Labor Relations Act, state discrimination statutes, state statutes and/or common law regulating employment termination, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/ negligent infliction of emotional distress or defamation.

Claims by Associates for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) shall not be subject to arbitration. Statutory or common law claims alleging that Circuit City retaliated or discriminated against an Associate for filing a state employment insurance claim, however, shall be subject to arbitration.

Rule 3. DISMISSAL/STAY OF COURT PROCEEDINGS

By agreeing to the Dispute Resolution Program, an Associate agrees to resolve through arbitration all claims described in or contemplated by Rule 2. If an Associate files a lawsuit in court to resolve claims subject to arbitration, the Associate agrees that the Court shall dismiss the lawsuit and require the Associate to arbitrate the dispute.

If an Associate files a lawsuit in court involving claims which are, and other claims which are not, subject to arbitration, the Associate agrees that the court shall stay litigation of the nonarbitrable claims and require that arbitration take place with respect to those claims subject to arbitration. The Associate further agrees that the Arbitrator's decision on the arbitrable claims, including any determinations as to disputed factual or legal issues, shall be entitled to full force and effect in any later court lawsuit on any nonarbitrable claims.

Rule 4. COMMENCEMENT OF ARBITRATION

a. PROCEDURE

An Associate shall commence an arbitration by filing the attached Circuit City Associate Arbitration Request Form with a required filing fee of $75 (made payable with a cashier's check or money order to Circuit City Stores, Inc.) to:

Arbitration Coordinator
Circuit City Stores, Inc.
9960 Mayland Drive
Richmond, Virginia 23233-1464

b. TIME LIMITS

i. FILING OF REQUEST FOR ARBITRATION

The "Circuit City Associate Arbitration Request Form" shall be submitted not later than one year after the date on which the Associate knew, or through reasonable diligence should have known, of the facts giving rise to the Associate's claim(s). The failure of an Associate to initiate an arbitration within the one-year time limit shall

constitute a waiver with respect to that dispute relative to that Associate.

ii. CIRCUIT CITY'S RESPONSE

Within 21 calendar days of receipt of an Associate's Arbitration Request Form and the accompanying filing fee, the Company shall send the Company's Response to the Associate via certified or registered mail, or hand delivery.

The Response, which also shall be mailed to the Associate's attorney if one has been retained, shall describe the Company's position regarding the allegations in the Associate's Arbitration Request Form.

c. NOTICE/OTHER FILINGS

All other communications, notices or filings, including discovery requests and responses, shall be in writing and shall be deemed to have been given if (i) delivered by hand to a person of suitable age and discretion; or (ii) mailed first class, registered mail, postage prepaid, as follows:

If to Circuit City: Arbitration Coordinator
Circuit City Stores, Inc.
9960 Mayland Drive
Richmond, Virginia 23233-1464

If to the Associate: (i) to the Associate's address of record as it appears on the Arbitration Request Form; or

(ii) to the Associate's attorney as designated in the Arbitration Request Form or

later designated in writing by the Associate.

Rule 5. SELECTION OF AN ARBITRATOR

Circuit City and the Associate shall participate equally in the selection of an Arbitrator to decide the arbitration. Within 21 calendar days after the Company receives the Associate's Arbitration Request Form, the American Arbitration Association (AAA) shall be asked to provide a panel of seven (7) neutral arbitrators with experience deciding employment disputes. The Company and the Associate then shall have the opportunity to review the background of the arbitrators by examining the materials provided by the AAA. Within seven (7) calendar days after the panel composition is received, the Associate and the Company each shall inform the AAA which arbitrators the Parties find unacceptable for deciding the dispute. The AAA then will appoint an Arbitrator from among the named individuals the Parties found acceptable.

Rule 6. TIME AND PLACE OF ARBITRATION

The arbitration hearing shall be held at the offices of, or a location selected by, the AAA in the city nearest the location of the Associate's last employment with the Company, unless the Parties agree otherwise. If the AAA does not select an arbitration location within fifty (50) miles of the city of the Associate's last employment with the Company, the Associate and the Company shall designate a mutually amenable location at which to hold the arbitration.

The Parties and the Arbitrator shall make every effort to see that the arbitration is completed, and an award rendered, as soon as possible. There

shall be no extensions of time or delays of an arbitration hearing except in cases where both Parties consent to the extension or delay, or where the Arbitrator finds such a delay or extension necessary to resolve a discovery dispute or other matter relevant to the arbitration.

Rule 7. REPRESENTATION

Both the Associate and the Company shall have the right to be represented by counsel.

Rule 8. DISCOVERY

a. INITIAL DISCLOSURE

Within fourteen (14) calendar days following the appointment of an Arbitrator, the Parties shall provide each other with copies of all documents (except for privileged documents that are protected from disclosure because they involve attorney-client, doctor-patient or other legally privileged or protected communications or materials) upon which they rely in support of their claims or defenses. Throughout the discovery phase, each Party shall provide the opposing Party with any and all documents relevant to any claim or defense.

Upon request, the Associate shall be entitled to a copy of all documents (except privileged documents as described above) in the Associate's "PERSONNEL RECORDS FILE."

b. OTHER DISCOVERY

i. INTERROGATORIES/DOCUMENT REQUESTS

Each Party may propound one set of 20 interrogatories (including subparts) to the opposing Party. Interrogatories are written

questions asked by one party to the other, who must answer under oath. Such interrogatories may include a request for all documents upon which the responding party relies in support of its answers to the interrogatories. Answers to interrogatories must be served within 21 calendar days of receipt of the interrogatories.

ii. DEPOSITIONS

A deposition is a statement under oath that is given by one party in response to specific questions from the other party, and usually is recorded or transcribed by a court reporter. Each Party shall be entitled to take the deposition of up to three (3) individuals of the Party's choosing. The Party taking the deposition shall be responsible for all costs associated therewith, such as the cost of a court reporter and the cost of a transcript.

iii. ADDITIONAL DISCOVERY

Upon the request of any Party and a showing of substantial need, the Arbitrator may permit additional discovery, but only if the Arbitrator finds that such additional discovery is not overly burdensome, and will not unduly delay conclusion of the arbitration.

c. DISCOVERY DISPUTES

The Arbitrator shall decide all disputes related to discovery. Such decisions shall be final and binding on the Parties. In ruling on discovery disputes, the Arbitrator shall be guided by the discovery rules contained in the Federal Rules of Civil Procedure.

d. TIME FOR COMPLETION OF DISCOVERY

All discovery shall be completed in an expeditious manner. In order to expedite the arbitration, the Parties may initiate discovery prior to the appointment of the Arbitrator. The Parties and the Arbitrator shall make every effort to complete all discovery within sixty (60) calendar days after the selection of the Arbitrator.

Rule 9. HEARING PROCEDURE

a. WITNESSES

Witnesses shall testify under oath, and the Arbitrator shall afford each Party a sufficient opportunity to examine its own witnesses and cross-examine witnesses of the other Party. Either Party may issue subpoenas compelling the attendance of any other person necessary for the issuing Party to prove its case.

i. SUBPOENAS

A subpoena is a command to an individual to appear at a certain place and time and give testimony. A subpoena also may require that the individual bring documents when he or she gives testimony. The Arbitrator shall have the authority to enforce and/or cancel such subpoenas provided that such subpoenas are issued no less than 10 calendar days prior to the commencement of an arbitration hearing or deposition. The Party issuing the subpoena shall be responsible for the fees and expenses associated with the issuance and enforcement of the subpoena, and with the attendance of the subpoenaed witness at the arbitration hearing.

ii. SEQUESTRATION

The Arbitrator shall ensure that all witnesses who will testify at the arbitration are not influenced by the testimony of other witnesses. Accordingly, the Arbitrator may sequester all witnesses who will testify at the arbitration, provided that the Arbitrator shall permit the Associate bringing the arbitration and the Company's designated representative to remain throughout the arbitration, even though they may or may not testify at the hearing.

b. EVIDENCE

The parties may offer evidence that is relevant and material to the dispute and shall produce any and all nonprivileged evidence which the Arbitrator deems necessary to a determination of the dispute. The Arbitrator need not specifically follow the Federal Rules of Evidence, although they may be consulted to resolve questions regarding the admissibility of particular matters.

c. BURDEN OF PROOF

An Associate has the burden of proving a claim or claims by a preponderance of the evidence. To prevail, an Associate must prove that the Company's conduct with respect to the Associate was a violation of applicable law

d. BRIEFING

Each Party shall have the opportunity to submit one pre-hearing and one post-hearing brief, which is a written statement of facts and law, in support of its position. Briefs shall be typed and shall be limited in length to 20 double-spaced pages.

Pre-hearing briefs may be submitted no later than ten (10) calendar days prior to a scheduled arbitration hearing. Post-hearing briefs may be submitted no later than twenty (20) calendar days after the Parties receive the transcript of the arbitration from the reporting service.

e. TRANSCRIPTION

The Parties may arrange for transcription of the arbitration by a certified reporter. The parties shall share evenly the costs of the reporter and transcription, subject to the provisions of Rule 13 below.

f. CONSOLIDATION

i. CLAIMS

The Arbitrator shall have the power to hear as many claims as an Associate may have against the Company consistent with Rule 2 of these Dispute Resolution Rules and Procedures. The Arbitrator may hear additional claims that were not mentioned in the Arbitration Request Form, provided the Associate adding claims notifies the Company at least 30 calendar days prior to a scheduled arbitration, the additional claims are timely as of the date on which they are added and the Company is not prejudiced in its defense by such addition.

ii. PARTIES

The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves an arbitration or lawsuit where representative members of a large group who

claim to share a common interest seek relief on behalf of the group).

g. CONFIDENTIALITY

All aspects of an arbitration pursuant to these Dispute Resolution Rules and Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public, except (i) to the extent both Parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the parties, or (iii) as may otherwise be appropriate in response to a governmental agency or legal process.

All settlement negotiations, mediations, and the results thereof shall be confidential.

Rule 10. SUBSTANTIVE CHOICE OF LAW

The Arbitrator shall apply the substantive law of the State in which the Associate is or was predominantly employed. For claims arising under federal law, the Arbitrator shall follow the substantive law applicable to the United States District Court for the District in which the Associate is or was predominantly employed.

Rule 11. ARBITRATOR AUTHORITY

The Arbitrator shall conduct the arbitration and shall have the authority to render a decision in accordance with these Dispute Resolution Rules and Procedures, and in a manner designed to promote rapid and fair resolution of disputes.

a. JURISDICTION

The Arbitrator's authority shall be limited to deciding the case submitted by the Associate. Unless the Associate is subject to a contract

providing for the employment of the Associate under specified terms or for a given duration, the Associate's employment remains alterable at the discretion of the Company and/or terminable at any time, at the will of either the Associate or the Company, with or without just cause. Accordingly, the Arbitrator shall have no authority to require that Circuit City have "just cause" to discipline or discharge an Associate or to change the terms and conditions of employment of an Associate unless specifically required by federal, state or local law, or as a remedy for a violation of applicable law by the Company with respect to the Associate.

b. SANCTIONS

The Arbitrator shall have the power to award sanctions against a Party for the Party's failure to comply with these Dispute Resolution Rules and Procedures or with an order of the Arbitrator. These sanctions may include assessment of costs, prohibitions of evidence, or, if justified by a Party's wanton or willful disregard of these Dispute Resolution Rules and Procedures, an adverse ruling in the arbitration against the Party who has failed to comply.

Rule 12. AWARD

Within 21 calendar days after receipt of post-hearing briefs, if any, the Arbitrator shall mail to the parties a written award specifying appropriate remedies, if any. In the Arbitrator's discretion, the award may include findings of fact and conclusions of law.

The Parties to an arbitration shall be provided with a copy of the Arbitrator's award. Other Associates who have agreed to arbitration may

request copies of arbitration decisions in a given case. In cases where an arbitration decision is provided to an Associate who was not a Party to the particular arbitration, the Party-Associate's name shall be deleted from the arbitration decision unless the Party-Associate agrees otherwise in writing.

Rule 13. FEES AND EXPENSES

a. COSTS OTHER THAN ATTORNEY FEES

1. Definitions

Costs of an arbitration include the daily or hourly fees and expenses (including travel) of the Arbitrator who decides the case, filing or administrative fees charged by the AAA, the cost of a reporter who transcribes the proceeding, and expenses of renting a room in which the arbitration is held. Incidental costs include such items as xeroxing or the costs of producing witnesses or proof.

2. Filing Fee/Costs of Arbitration

An Associate initiating an arbitration shall pay a filing fee of seventy-five dollars ($75) made payable with a cashier's check or money order to Circuit City Stores, Inc. Circuit City shall advance the remainder of the costs of the arbitration. Each Party shall advance its own incidental costs and pay its own attorney fees. Subject to the other provisions of this Rule set forth below, each Party shall pay one-half of the costs of arbitration following the issuance of the arbitration award.

3. Shifting of Costs

If the Associate prevails in arbitration, whether or not monetary damages or remedies are awarded,

the filing fee shall be refunded to the Associate, and the Arbitrator may require that Circuit City pay the Associate's share of the costs of arbitration and incidental costs. If Circuit City prevails in arbitration, the Arbitrator may require the Associate to pay Circuit City's share of the costs of arbitration and incidental costs.

4. Payment of Costs

The Parties shall pay all previously unpaid arbitration costs within ninety (90) calendar days of the issuance of the arbitration award. If the Associate is required to pay some or all of the costs or fees of arbitration and either pays, or makes arrangements to pay, said costs or fees within ninety (90) calendar days after the issuance of the arbitration award, the Associate's liability for the costs and fees of arbitration, other than attorney fees, shall be limited to three percent (3%) of the Associate's most recent annual compensation at Circuit City. If the Associate fails to pay, or fails to make arrangements to pay, the Associate's share of fees and costs within ninety (90) calendar days, the three percent (3%) cap shall not apply.

If the Associate fails to pay within ninety (90) calendar days, and the Associate is still employed by the Company, Circuit City may deduct the amount owed from the Associate's paycheck. Such deduction may not exceed a rate of five percent (5%) of the Associate's compensation per pay period.

b. ATTORNEY FEES

Each Party generally shall be liable for its own attorney fees. If the Associate prevails in arbitration, the Arbitrator shall have discretion to

award the Associate reasonable attorney fees. If Circuit City prevails in the arbitration, the Arbitrator shall have discretion to require the Associate to pay the Company's reasonable attorney fees if the Arbitrator finds that the Associate's claim was frivolous, or presented in bad faith or for an improper purpose, such as to harass the Company.

An award of attorney fees to either Party shall be reasonable in light of the amount and complexity of work involved in the arbitration, and in accordance with customary billing rates of attorneys in the geographic area in which the arbitration is held.

Rule 14. REMEDIES AND DAMAGES

If the Arbitrator finds for the Associate, the Arbitrator, in his discretion, may award one or more of the following:

1. Injunctive relief, including reinstatement to the position of employment the Associate held or, if such reinstatement is impractical, to a comparable position at the location of the Associate's last employment;

2. If reinstatement at the place of the Associate's last employment is not practical, reinstatement to a comparable position at Circuit City in the same general geographic market area;

3. Full or partial back pay and reimbursement for lost fringe benefits, but only up to one year from the point at which the Associate knew or should have known of the events giving rise to the alleged violation of law, with interest, reduced by interim earnings, public or private benefits received, and

amounts that could have been received with reasonable diligence;

4. If reinstatement is not practical or reasonable under the circumstances, recognizing that in only rare cases will reinstatement be impractical but nevertheless warranted, the Arbitrator may award up to 24 months of front pay in lieu of reinstatement;

5. Compensatory damages in accordance with applicable law;

6. Punitive damages in an amount up to the greater of:

(a) an amount equal to the monetary award, if any, rendered pursuant to Subsections 3 and/or 4 of this Rule; or

(b) $5,000.

Rule 15. SETTLEMENT

The Parties may settle their dispute at any time. Prior to closure of the arbitration hearing, the Parties may settle the case without involvement of the Arbitrator. Once the hearing has closed, settlement may take place only with approval of the Arbitrator.

At any point prior to the Arbitrator's issuance of an award, the Parties may, by agreement, refer their dispute to mediation before a mediator provided by the AAA.

Rule 16. ENFORCEABILITY

The Dispute Resolution Agreement and any award rendered pursuant to it shall be enforceable and subject to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. and the Uniform Arbitration Act of Virginia, 8.01-581.01 et seq., regardless of

the State in which the arbitration is held or the substantive law applied in the arbitration.

Rule 17. APPEAL RIGHTS

The award rendered by the Arbitrator shall be final and binding as to both the Associate and the Company. Either party may appeal the Arbitrator's decision to a court in accordance with the appeal procedures of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. or the Uniform Arbitration Act of Virginia, 8.01-581.01 et seq.

Rule 18. SEVERABILITY/CONFLICT WITH LAW

In the event that any of these Dispute Resolution Rules and Procedures agreed upon by the Parties is held to be in conflict with a mandatory provision of applicable law, the conflicting Rule or Procedure shall be modified automatically to comply with the mandatory provision of applicable law until such point as these Dispute Resolution Rules and Procedures may be modified in accordance with Rule 19 below. In the event of an automatic modification with respect to a particular Rule or Procedure, the remainder of these Rules and Procedures shall not be affected. An automatic modification of one of these Rules or Procedures shall be applicable only in the jurisdiction in which it is in conflict with a mandatory provision of law. In all other jurisdictions, these Dispute Resolution Rules and Procedures shall apply in full force and effect.

Rule 19. TERMINATION OR MODIFICATION OF DISPUTE RESOLUTION AGREEMENT OR DISPUTE RESOLUTION RULES AND PROCEDURES

Circuit City may alter or terminate the Agreement

and these Dispute Resolution Rules and Procedures on December 31st of any year upon giving 30 calendar days written notice to Associates, provided that all claims arising before alteration or termination shall be subject to the Agreement and corresponding Dispute Resolution Rules and Procedures in effect at the time the claim arose. An Associate shall be deemed to have accepted a modification or termination of the Dispute Resolution Agreement or the Rules and Procedures by accepting or continuing employment with Circuit City after receiving notice of such modification or termination.

CIRCUIT CITY®

Circuit City Stores, Inc.
9950 Maryland Drive
Richmond, VA 23233-1464

Supreme Court, U.S.
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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC., *Petitioner,*

v.

SAINT CLAIR ADAMS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Employers Group is a nonprofit corporation headquartered in the State of California. With nearly 5,000 member companies employing approximately 2.5 million employees, the Employers Group is the nation's oldest and largest human resource management association. Its purpose is to educate its members about employment law and keep them informed of employment issues. In addition, the group routinely represents the interests of its members in the legislative process and files briefs *amicus curiae* in cases in which those interests are implicated.

Many of the Employers Group's member companies have agreed in contracts of employment to arbitrate disputes with their employees. These arbitration agreements enable both employers and employees alike to avoid the expense of litigation. Just as importantly, these agreements also help to promote and preserve cooperative, productive working environments by resolving disputes quickly before they create permanent mistrust and estrangement.

California has long been hostile to the enforcement of arbitration agreements in the employment area. This Court has already held that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, preempts a California law barring arbitration of wage disputes, *see Perry v. Thomas*, 482 U.S. 483 (1987); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (holding that the FAA preempts application of a California law concerning franchise investments), and the California legislature recently considered legislation prohibiting employers from even requesting an agreement to arbitrate in most employment contracts (and rendering any such agreements

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[1] Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amicus* and its counsel has made any monetary contribution to the preparation and submission of this brief.

unenforceable).[2] Arbitration agreements in employment contracts have also repeatedly been attacked in California courts as unconscionable contracts of adhesion and as contrary to public policy. *See, e.g., Kinney v. United HealthCare Serv.*, 70 Cal. App. 4th 1322 (1999) (unconscionable); *Stirlen v. Supercuts*, 51 Cal App. 4th 1519 (1997) (unconscionable and contrary to public policy). In fact, the California Supreme Court is currently considering an unconscionability claim in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 973 P.2d 51 (Cal. 1999), and it has deferred consideration of a number of similar claims pending its ruling in that case.[3] As a consequence, if this Court were to find that all contracts of employment are excluded from the coverage of the FAA, many agreements to arbitrate involving the Employers Group's member companies could become unenforceable. Because of the importance of this issue to its members and to the country as a whole, the Employers Group has a vital interest in the question presented in this case.

INTRODUCTION AND SUMMARY

Ten years ago, several *amici* questioned whether the FAA applies to any employment contracts. *See Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991). Such contracts, the *amici* argued, are not covered by the FAA because they fall within the exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" in

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[2] *See* A.B. 858, 1999-2000 Reg. Sess., § 2 (Cal. May 3, 1999) <http://www.leginfo.ca.gov/pub/bill/asm/ab_0851-0900/ab_858_bill_20000124_amended_sen.pdf>.

[3] *See, e.g., Ramirez v. Circuit City Stores, Inc.*, 995 P.2d 137 (Cal. 2000); *Maciejewski v. Alpha Sys. Lab, Inc.*, 986 P.2d 170 (Cal. 1999); *Pichly v. Nortech Waste*, 986 P.2d 169 (Cal. 1999); *Lee v. Technology Integration Group*, 978 P.2d 1 (Cal. 1999); *Gonzales v. Hughes Aircraft Employees Federal Credit Union*, 978 P.2d 1 (Cal. 1999).

Section 1 of the Act. 9 U.S.C. § 1. Although this Court decided to "leave for another day the issue raised by *amici curiae*," *Gilmer*, 500 U.S. at 25 n.2, eleven circuits and one state supreme court have since determined or reaffirmed that this exclusion covers only contracts of individuals employed in the interstate or international transportation of goods and people.[4] Indeed, the Ninth Circuit is the only circuit considering the issue after *Gilmer* to find that the contract-of-employment exclusion covers all employment contracts.

The Ninth Circuit adopted this anomalous position in a 1999 decision captioned *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), which the *per curiam* decision below followed without comment. *See Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131, 1132 (9th Cir. 1999). While most courts have focused on the language of the exclusion in Section 1, in *Campbell Soup* the Ninth Circuit took a different tack. It focused upon history, arguing that an expansive reading of the exclusion is supported by the historical understanding of its language, the historical scope of Congress' commerce power, and the Act's legislative history. *See* 177 F.3d at 1084-90. As demonstrated below, these historical arguments are irrelevant because the meaning of the text of the exclusion is plain. In

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[4] *See Brennan v. King*, 139 F.3d 258, 264 n.5 (1st Cir. 1998); *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-36 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998)(op. of Cox, J. and Tjoflat, J.); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Brown v. KFC Nat'l Management Co.*, 921 P.2d 146, 156 & n.13 (Haw. 1996).

addition, the historical arguments are without merit. First, there is no material difference between the current understanding of the language of the exclusion and the understanding in 1925 when the FAA was first enacted. Second, even in 1925, the commerce power was not as circumscribed as the Ninth Circuit suggested in *Campbell Soup*. Finally, the legislative history is ambiguous and contradictory, and it therefore fails to provide a basis for departing from the plain language of the contract-of-employment exclusion.

ARGUMENT

I. THE FAA COVERS EMPLOYMENT CONTRACTS OF PERSONS NOT INVOLVED IN INTERSTATE OR INTERNATIONAL TRANSPORTATION.

Although the Ninth Circuit holds that the Federal Arbitration Act does not apply to any contracts of employment, neither the decision below nor the *Campbell Soup* opinion actually analyzes the language of the contract-of-employment exclusion. This is not surprising: that language clearly does not cover all employment contracts. Moreover, contrary to the suggestion in *Campbell Soup*, Section 2 of the FAA does not indicate otherwise. Indeed, that section supports the more limited reading of the exclusion that every other court of appeals to consider the question has adopted.

A. The Contract-of-Employment Exclusion Covers Only Contracts of Individuals Engaged in Interstate or International Transportation.

The final sentence of Section 1 of the FAA provides:

> nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. As the heading of Section 1 suggests, and the context makes clear, this passage does not simply limit the

definitions of "maritime transactions" and "commerce" in the rest of Section 1; the exclusion limits the application of the statute as a whole. *See Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines*, 192 F.2d 310, 312 (3d Cir. 1951) (noting that the heading was enacted into positive law in 1947). Even more pertinently, under well-settled rules of statutory interpretation, this exclusion does not encompass all contracts of employment, but is instead limited to contracts governing the employment of individuals engaged in the interstate or international transportation of goods and people.

As this Court recently reiterated, "[s]tatutory language must be read in context" because "a phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999) (quotation omitted); *see also Neal v. Clark*, 95 U.S. 704, 708 (1877) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be interpreted by reference to that which precedes and follows it.") (quotation omitted). As a consequence, when words in a statute are "grouped in a list," those words "should be given related meaning." *Third Nat'l Bank in Nashville v. Impac, Ltd.*, 432 U.S. 312, 322 (1977). And when a statutory list contains several specific terms followed by a general one, it has long been recognized that "the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. United States*, 522 U.S. 398, 404 n.2 (1998) (quotation omitted); *see also Cleveland v. United States*, 329 U.S. 14, 18 (1946) (noting that "general words are confined to the class and may not be used to enlarge it"); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that this principle "limits general terms which follow specific ones to matters similar to those specified"); *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 48-49 (1925) (same).

This principle, which is often referred to as the "*ejusdem generis*" or "of the same kind" rule, is based upon a sound,

practical consideration: if the general term in a list is construed to its widest extent, it may render the more specific terms preceding it superfluous. It is, however, a "cardinal principle of statutory construction" that, unless absolutely necessary, courts must not ignore any portion of a statute or render it meaningless; instead, they must "give effect, if possible, to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (quotation omitted); *see also Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997). Accordingly, when a general term is preceded by specific terms encompassed by that term, under the *ejusdem generis* principle, the general term is normally interpreted to embrace only objects similar in scope to the specific terms. *See* 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 272-74 (6th ed. 2000). In this way, both the specific and the general terms are given meaning because the specific terms define the class to which the general term extends. *See id.* at 283-85.

The *ejusdem generis* principle plainly applies to the FAA's contract-of-employment exclusion. That exclusion contains a list in which specific terms ("seamen" and "railroad employees") precede a general term ("any other class of workers engaged in foreign or interstate commerce"), and, as several courts of appeals have noted, if the general term in the exclusion were interpreted to extend to its fullest scope, it would "rob the rest of the exclusion clause of all significance." *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (quotation omitted); *accord Cole v. Burns Int'l. Sec. Serv.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997); *Asplundh Tree Expert v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

Two additonal considerations support application of the *ejusdem generis* principle here. First, the exclusion does not simply refer to "any class of workers engaged in foreign or interstate commerce"; it refers to "any *other* class of workers

engaged in foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), thereby indicating a limitation on the scope of the excluded class that is linked to the workers previously enumerated in the exclusion. Second, the exclusion carves out an exception to social legislation and must therefore be narrowly construed. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993); *A.H. Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945). Thus, under the *ejusdem generis* principle, the exclusion's reference to "any other class of workers engaged in foreign or interstate commerce" should be read in light of the prior references to "seamen" and "railroad workers" to extend only to the class of workers typified by seamen and railroad workers, that is, to workers involved in the transportation of goods and persons in interstate and foreign commerce.

It is, of course, true that the *ejusdem generis* principle is only a rule of construction used in ascertaining the intent of Congress and that it "may not be used to defeat the obvious purpose of legislation." *Gooch*, 297 U.S. at 128. A narrow reading of the exclusion, however, furthers rather than defeats the goal of the FAA. The Act was intended primarily to "ensure judicial enforcement of privately made agreements to arbitrate" and secondarily to "promote the expeditious resolution of claims" without the "costliness and delays of litigation." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (quotation omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) (noting the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements"). Application of the *ejusdem generis* rule furthers both of these goals because it narrows the scope of the exclusion for contracts of employment, thereby ensuring that more agreements to arbitrate will be enforced and more costly litigation avoided in spite of any state laws hostile to arbitration. *Cf. Southland*, 465 U.S. at 16 (holding that the FAA preempts "state

legislative attempts to undercut the enforceability of arbitration agreements").

Moreover, it makes good sense to apply the FAA to contracts of employment. Arbitration gives parties the flexibility to choose decisionmakers with specialized expertise that judges may lack and to tailor procedures to particular disputes. *See, e.g.*, James A. King *et al.*, *Agreeing to Disagree on EEO Disputes*, 9 Lab. Law. 97, 100 (1993); *see also Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes*, 9A Lab. Rel. Rep. (BNA) No. 142, at 534:401 (May 9, 1995) (recommending procedures for arbitrating employment disputes involving statutory rights). Just as importantly, because arbitration is quicker and cheaper than litigation, it is more accessible to employees and more economical for employers, and it avoids much of the psychological stress and reputational harms associated with litigation that can poison the employment relationship. *See, e.g.*, David Sherwyn *et al.*, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bathwater, and Constructing a New Sink in the Process*, 3 U. Penn. J. Lab. & Emp. L. 73, 81-82, 91-99 (1999); King, *Agreeing to Disagree*, 9 Lab. Law. at 99-101. Indeed, it is because of these many advantages that arbitration has become "the primary mechanism for resolving disputes arising under collective bargaining agreements." 1 Patrick Hardin, *The Developing Labor Law* 1008 (3d ed. 1992).

In addition, Congress had good reason to exclude seamen and railroad workers from the FAA. While the Act makes agreements to arbitrate future disputes as well as any resulting awards enforceable, *see* 9 U.S.C. §§ 2, 13, earlier statutes treated seamen and railroad workers differently. One statute made certain arbitration agreements between seamen and their employers voluntary for seamen, *see* 46 U.S.C. § 651; *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925), and while a second statute made arbitration mandatory for employment

disputes involving railroads, it provided no mechanism for enforcement. *See* Transportation Act of 1920, 41 Stat. 456, 469-74 (1920); Douglas L. Leslie, *The Railway Labor Act* 36-37 (1995).

Ignoring these considerations, the Ninth Circuit argued in *Campbell Soup* that a narrow interpretation of the contract-of-employment exclusion makes little sense because transportation workers besides railroad workers and seamen were not subjected to any statutory dispute resolution scheme in 1925. *See* 177 F.3d at 1092. However, as Chief Judge Posner pointed out, Congress may have anticipated that modes of transportation such as airplanes and motor carriers would, when they matured, be subjected to comprehensive regulation. *See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997).[5] In any event, there is no rule requiring that exceptions to economic legislation be narrowly tailored to the same broad principle. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970). Indeed, Congress can, and does, carve out statutory exceptions based on no principle beyond political

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[5] Citing a law review article, the Ninth Circuit asserted that motor transportation was already "a critical subject of Congress' interstate commerce power" in 1925. *See Compbell Soup*, 177 F.3d at 1092 (citing Matthew W. Finkin, *"Workers' Contracts" under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 291(1996)). That article, however, says only that "[t]he interstate transportation of goods and passengers by motor carrier was not an insignificant part of interstate commerce," Finkin, *Workers' Contracts*, 17 Berkeley J. Empl. & Lab. L. at 291, and while it asserts that the "visibility of these enterprises politically was heightened by the legal contest over their regulatory status at the time," *id.* at 291 & n.40, it cites only a decision of this Court applying the dormant commerce clause to state regulation of interstate carriers in support of that assertion. *See id.* (citing *Buck v. Kuykendall*, 267 U.S. 307 (1925)). Moreover, according to an authority cited by the article, no federal regulation of interstate carriers had even been proposed when the FAA was debated and enacted. *See* John J. George, *Motor Carrier Regulation in the United States* 234-46 (1929).

influence and power. As a consequence, the Ninth Circuit's criticism provides no justification for refusing to apply the *ejusdem generis* principle to the contract-of-employment exclusion.

B. Section 2 of the FAA Supports a Narrow Interpretation of the Exclusion.

In *Campbell Soup*, the Ninth Circuit argued that Section 2 of the FAA supports an expansive interpretation of the contract-of-employment exclusion because that section does not cover contracts of employment. *See* 177 F.3d at 1084-85. In fact, just the opposite is true: Section 2 covers contracts of employment, and it supports a narrow interpretation of the contract-of-employment exception.

The Ninth Circuit's reading of the contract-of-employment exclusion cannot be reconciled with the structure of the FAA. As this Court has recognized, Section 2 is the "primary substantive provision" of the Act, *Gilmer*, 500 U.S. at 24, and the other portions of the Act are therefore interpreted in light of the limitations upon the scope of Section 2, *see Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956). Consequently, if Section 2 did not cover contracts of employment, the contract-of-employment exclusion in Section 1 would be superfluous. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967). As a "cardinal principle of statutory construction is to save and not to destroy," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), the Ninth Circuit's interpretation must be rejected unless it is compelled by the plain language of the statute.

The language of Section 2 is, however, more than broad enough to encompass contracts of employment. By its terms, Section 2 applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The term "transaction" can refer to any "communicative action or activity involving

two parties or two things reciprocally affecting or influencing each other." *Webster's Third New Int'l Dictionary* 2425 (1971); *see also American Heritage Dictionary of the English Language* 1899 (3d ed. 1992) (defining "transaction" to include any "[c]ommunication involving two or more people that affects all those involved"). Because the parties to an employment contract exchange mutually binding promises, thereby "reciprocally affecting or influencing each other," employment contracts fit comfortably within the definition of "transaction."

In *Campbell Soup*, the Ninth Circuit reached a different conclusion based upon the supposed understanding of the word "transaction" in 1925 when the FAA was passed. According to the court of appeals, at that time the word "transaction" referred only to "business deals" or to acts "involving buying and selling." 177 F.3d at 1085. An employment contract *is*, however, a sort of business deal. Even more importantly, in 1925, the term "transaction" had a much broader meaning than the Ninth Circuit admits. Although the term could be used to apply to the buying and selling of goods, it also applied more generally to "the doing, performing or carrying out of *anything*." *The International Encyclopedia Dictionary* 4150 (1901) (emphasis added); *see also* Noah Webster, *An American Dictionary of the English Language* 1166 (C. Goodrich rev. ed. 1859) (defining "transaction" to mean "[t]he doing or performing of any business" or "management of any affair"); *A Standard Dictionary of the English Language* 1915 (1903) ("the conduct or management of *any* undertaking or business affair") (emphasis added). Moreover, in legal usage, the term referred to "[w]hatever may be done by one person which affects another's rights, and out of which a cause of action may arise." Henry C. Black, *A Law Dictionary* 1166 (2d ed. 1910). Thus, the Ninth Circuit's reliance on the historical understanding of the term is misplaced because even in 1925, Section 2's reference to "transaction" could easily have been interpreted to encompass contracts of employment.

II. EVEN IN 1925, THE EXCLUSION DID NOT COVER ALL EMPLOYMENT CONTRACTS SUBJECT TO CONGRESSIONAL REGULATION.

In *Campbell Soup*, the Ninth Circuit argued that the FAA should not be interpreted to cover any contracts of employment now because the statute did not reach such contracts when it was enacted in 1925. *See* 177 F.3d at 1086-88. According to the Ninth Circuit, at that time Congress' power to regulate pursuant to the Commerce Clause was "limited to employees who actually transported people or goods in interstate commerce." *Id.* at 1087. Since Section 1 excludes employment contracts involving such individuals, the Ninth Circuit reasoned that Congress did not intend the FAA to apply to any employment contracts and that the Act should not be interpreted to cover any employment contracts under the more expansive Commerce Clause power now recognized. *See id.* at 1087-88. This argument suffers from three defects.

First, the Ninth Circuit's argument ignores the language of the exclusion. As other courts of appeals have recognized, if Congress had intended to exclude all employment contracts from the FAA, it "could simply have said 'nothing herein shall apply to contracts of employment.'" *Cole*, 105 F.3d at 1471-72; *accord O'Neil*, 115 F.3d at 274; *Rojas*, 87 F.3d at 748. Section 1, however, provides that "nothing herein contained shall apply to contracts of employment *of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). In light of the cardinal rule that courts must "avoid a reading which renders some words altogether redundant," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995), these additional words of limitation cannot be ignored and the exclusion therefore cannot be interpreted to reach all employment contracts.

Second, the argument incorrectly assumes that when Congress enacted the FAA, it viewed its power to regulate

arbitration agreements in employment contracts as limited to the area of interstate and international transportation.

This assumption is based on this Court's interpretation of the scope of the Commerce Clause prior to 1937. *See Campbell Soup*, 177 F.3d at 1086-87. Congress did not, however, rely solely upon the Commerce Clause in enacting the FAA. As Justice O'Connor has demonstrated, when it passed the FAA, "Congress thought it was exercising its power to dictate either procedure or 'general federal law' in federal courts." *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting); *see also* H.R. Rep. No. 68-96, at 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . ."). While this view proved incorrect—this Court later held that the duty to arbitrate is substantive rather than procedural, *see Bernhardt*, 350 U.S. at 202-04, and that there is no general federal common law, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)—Congress' reliance on its supposed power to prescribe procedure and general federal common law nonetheless undermines the Ninth Circuit's assumption that Congress doubted its power to include employment contracts outside the transportation sector in the FAA.

In any event, even in 1925 Congress's authority under the Commerce Clause was far broader than the Ninth Circuit assumed. Although during this period this Court sometimes characterized certain economic activities as beyond the scope of Congress' power under the Commerce Clause, *see, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941), its decisions in the period were "not marked . . . by a coherent or consistent course of interpretation." *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *see generally* Robert L. Stern, *The Commerce Clause and the National Economy, Part I*, 49 Harv. L. Rev. 645, 647-53 (1946).

Even more importantly, this Court has never suggested that commerce was limited to transportation. To the contrary, by 1925 it was well settled that interstate commerce "includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899); *see also Real Silk Hosiery Mills v. Portland*, 268 U.S. 325, 335 (1925) ("The negotiation of sales of goods which are in other States, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.") (quotation omitted). Moreover, by 1925 transportation was not the only "instrumentality" of commerce recognized by this Court: nearly fifty years before that time, this Court recognized that telegraphs were also instrumentalities of commerce. *See Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1877). Thus, under any interpretation of the Commerce Clause, Congress' authority stretches beyond interstate transportation to encompass interstate communications as well as the buying and selling of goods across state lines.

Although Congress did not attempt in 1925 to regulate employment in these areas, it had clear authority to do so. According to the decisions of this Court at the time, Congress' power to regulate under the Commerce Clause extended to "every instrument and agent by which such commerce is carried on," and the men who performed or made possible the various "act[s] of interstate commerce" were treated as "agents . . . of commerce" subject to congressional regulation. *In re Second Employer's Liab. Cases*, 223 U.S. 1, 47-48 (1912). Consequently, in 1925 Congress possessed recognized authority under the Commerce Clause to enact legislation concerning the "conditions under which those agents . . . perform the work of interstate commerce" so long as that legislation had a "real or substantial connection with the interstate commerce." *Id.* at 48-49; *see also First Employer's Liab. Cases*, 207 U.S. 463, 495 (1908) (noting that Congress

has the "power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on the subject are solely confined to interstate commerce"). Thus, the employment of individuals engaged in interstate sales and interstate communications was every bit as subject to regulation by Congress as the employment of individuals engaged in interstate transportation.

Third, there is no reason to assume that Congress intended the contract-of-employment exclusion to expand in tandem with Section 2. The Ninth Circuit's opinion assumes that, if Section 1 excluded all employment contracts in 1925, it should continue to exclude all employment contracts covered by that Section despite the subsequent liberalization of this Court's interpretation of the Commerce Clause. Statutory exceptions are, however, generally interpreted narrowly. *See supra* p. 7. Even more importantly, the language of Section 2 is broader than the language of the contract-of-employment exclusion. Section 2 covers any written arbitration provision in "a contract evidencing a contract involving commerce." 9 U.S.C. § 2. As this Court has recognized, this section's reference to transactions "involving commerce" is "broader than the often-found words of art 'in commerce,'" and therefore "cover[s] more than only persons or activities within the flow of interstate commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (quotation omitted). As the exclusion refers only to employees "engaged *in* foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), it is plainly more limited. Thus, even if the exclusion had covered all employment contracts that Congress could have regulated in 1925, it would by no means follow that the exclusion should continue to be read to cover all employment contracts covered by the more broadly worded Section 2.

III. THE LEGISLATIVE HISTORY OF THE FAA IS IRRELEVANT AND, IN ANY EVENT, CANNOT SUPPORT THE INTERPRETATION BELOW

In *Campbell Soup*, the Ninth Circuit asserted that the legislative history of the FAA supports its expansive reading of the contract-of-employment exclusion. *See* 177 F.3d at 1089-90. The legislative history is, however, irrelevant because where, as here, the language of the statute is unambiguous, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). In any event, unlike the language of the exclusion, the legislative history is ambiguous and confused.

A. The Legislative History Is Irrelevant Because the Meaning of the Language of the Exclusion Is Plain.

As this Court has repeatedly recognized, the best evidence of Congress' intent is "the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Accordingly, courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Instead, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quotation omitted). As demonstrated above, the text of the FAA's contract-of-employment exclusion belies any suggestion that all contracts of employment are excluded from the Act. Instead, the plain language of Section 1 shows that the exclusion covers only contracts of employment of individuals such as railroad workers and seamen who are engaged in the interstate and international movement of goods and persons. *See supra* pp. 4-12. As there is no suggestion of any extraordinary circumstances justifying disregard of this plain meaning, there

is no need even to address the legislative history of the exclusion.

B. In Any Event, the Legislative History Does Not Justify an Expansive Interpretation of the Exclusion.

The legislative history of the FAA offers little, if any, support for the Ninth Circuit's expansive interpretation of the exclusion. The legislative history as a whole is sparse, and in the little legislative history that exists, there is almost no mention of the contract-of-employment exclusion. Moreover, "[a]s is so often the case," the historical materials that exist "cut[ ] both ways." *Department of the Air Force v. Rose*, 425 U.S. 352, 388-89 (1976) (Blackmun, J., dissenting). As a consequence, the legislative history offers no basis for disregarding the plain language of the exclusion.

1. There Is No Material Discussion of the Exclusion in the Legislative History.

The legislative history of the FAA is limited. As two commentators noted shortly after the Act was passed, it is "remarkable how so important and far reaching legislation can emerge from Congress with such a dearth of intelligent discussion." Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. Rev. 428, 430 n.121 (1932). The bills that became the Federal Arbitration Act, or the "United States Arbitration Act" as it was originally titled (*see* 43 Stat. 883, 886 (1925)), were introduced in December 1923. *See* S. 68-1005 (1923); H.R. 68-646 (1923). After House and Senate subcommittees of the respective judiciary committees held a joint hearing on the bills the next month, *see Arbitration of Interstate Commercial Disputes, Hearing on H.R. 646 and S. 1005 before the Joint Comm. of Subcommittees on the Judiciary*, 68th Cong., 1st Sess. (1924) (memorandum from Julius Henry Cohen) [hereinafter "1924 Joint Hearing"], the

two committees issued short (two- and four-page) reports on the bills, *see* H.R. Rep. No. 68-96 (1924); S. Rep. No. 68-536 (1924), which were then passed unanimously by both Houses without any substantive debate, *see* 66 Cong. Rec. S2759-62 (1925); 65 Cong. Rec. H11080-82 (1924).

Even more pertinently, as one of the Ninth Circuit's own authorities concedes, there is "virtually no official legislative history" concerning the contract-of-employment exclusion. Matthew W. Finkin, *Employment Contracts under the FAA—Reconsidered*, 48 Lab. L.J. 329, 329 (1997). Neither of the committee reports mentions the exclusion, much less explains its purpose or scope. There is no mention of the exclusion in the little discussion of the Act that occurred on the House and Senate floors. And none of the witnesses at the joint hearing discussed it. Indeed, the only mention of the exclusion in all of the legislative history of the bills that became the FAA is in one sentence of one of the letters reprinted in the transcript of the joint hearing. *See* 1924 Joint Hearing 21 (reprinting a January 31, 1923 letter from Herbert Hoover to Senator Thomas Sterling).

In purporting to rely upon the legislative history of the FAA, the Ninth Circuit in *Campbell Soup* looked to testimony at a 1923 hearing before a subcommittee of the Senate judiciary committee concerning a precursor of the FAA introduced in the prior Congress. *See Campbell Soup*, 177 F.3d at 1089-90 (discussing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing before Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) [hereinafter "1923 Senate Hearing"]). Although members of this Court have consulted those hearings before, *see Gilmer* 500 U.S. at 39 (Stevens, J., dissenting); *Southland*, 465 U.S. at 25 n.7, 27 n.12 (O'Connor, J., dissenting), the testimony at those hearings is of limited value. Such testimony reflects the views of the witnesses, not the views of the members of Congress who

enacted the legislation in question. Accordingly, this Court has repeatedly held that testimony of this sort deserves "little weight." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976); *see also Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) ("declin[ing] to accord any significance to these statements" of witnesses at hearings); *McCaugh v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) (characterizing such statements as "without weight").

One commentator has suggested that the FAA should be interpreted differently because the bills that became the FAA were proposed by an American Bar Association committee in 1922 and enacted with only minor revisions. *See* Ian R. MacNeil, *American Arbitration Law* 107-09 (1992); *see generally id.* at 83-101 (discussing the ABA's successful campaign to enact the FAA). According to this commentator, the FAA was really a "legislation of adhesion," and therefore "if we wish to ascertain Congress's intention and purpose, our focal point must be what Congress understood to be the goals of those presenting the fully drafted statute." *Id.* at 108.

There are two flaws in this argument. First, the contract-of-employment exclusion was not part of the ABA's original proposal in 1922; it was instead proposed at the 1923 hearing before the Senate Judiciary Committee in response to criticism from the head of the International Seamen's Union. *See* 1923 Senate Hearing at 9; MacNeil, *American Arbitration Law* 89-91. Moreover, even though the witness making this later proposal was an ABA official, the ABA's position on the exclusion was not consistent. As explained more fully below, *see infra* pp. 23-25, although the witness who initially proposed the exclusion asserted that the FAA was not intended to be an "act referring to labor disputes at all," 1923 Senate Hearing at 9, the ABA committee that proposed the FAA in 1922 later stated that it had "originally favored the application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy." 53

ABA Reports 351 (1928). Thus, even if the intent of the ABA were relevant in general under the "legislation-of-adhesion" theory, it is by no means clear that its intent concerning the exclusion would be.

Second, whether or not Congress simply adopted the views of the ABA, it would be both improper and unfair to base an interpretation of the FAA on testimony at the 1923 Senate hearing. There were only three senators present at that hearing, *see* 1923 Senate Hearing at 1, and while the transcript of the hearing was presumably distributed to members of Congress, there is no mention of that hearing in the legislative history of the FAA. Indeed, all three witnesses who testified in 1923 before the Senate judiciary committee reappeared in 1924 at the joint hearing before subcommittees of the judiciary committees of both Houses and for the most part repeated their prior testimony. *See* MacNeil, *American Arbitration Law* 92-93. As a consequence, an ordinary citizen seeking to determine the meaning of the FAA would have no way of knowing about the Senate hearing in 1923, much less a reason to suspect that the testimony by a witness at that hearing would define the meaning and scope of the exclusion in Section 1 of the FAA. Indeed, the authors of one of the most comprehensive earlier law review articles on the FAA were unaware of the 1923 Senate hearing and therefore described the contract-of-employment exclusion as "curious as it is unaccounted for in any discussion." Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements*, 8 N.Y.U. L.Q. Rev. at 435. In short, the 1923 Senate hearings constitute a form of secret history that has no place in a truly democratic system.

In its *amicus* brief in *Gilmer*, the AFL-CIO wandered even further afield, citing the proceedings from its own convention in 1925 and that of the International Seamen's Union two years before. *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner, *Gilmer v. Interstate/Johnson Lane*

Corp., No. 90-18, at 10-24 (U.S. Nov. 15, 1990) [hereinafter "AFL-CIO Br."]. This Court has, however, consistently held that material outside the legislative process, whether or not contemporaneous, has little relevance. *See, e.g., Gustafson*, 513 U.S. at 580 ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."); *see also Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 n.* (1987) (noting that "the *post hoc* statements of interested onlookers [are] entitled to no weight"). Indeed, construing the FAA based upon statements by union leaders at their national conventions is a little bit like construing a nuclear energy bill in light of a speech by Ralph Nader before a Green Party convention. In any event, as one of the Ninth Circuit's own authorities concedes, there is no evidence suggesting that anyone in Congress relied upon the materials cited by the AFL-CIO. *See* Finkin, *Workers' Contracts*, 17 Berkeley J. Emp. & Lab. L. at 295 n.61. Thus, the historical materials upon which the Ninth Circuit relied in *Campbell Soup* have no value.

2. The Historical Materials Cited by the Ninth Circuit and Supporters of Its Interpretation Are Confused and Ambiguous

Even taken at face value, the historical materials cited by the Ninth Circuit and other supporters of a broad interpretation of the contract-of-employment exclusion are far too confused and ambiguous to provide a basis for interpreting the exclusion.

1. In *Campbell Soup*, the Ninth Circuit relied upon the 1923 Senate hearing and an amendment to Section 2 of the Act. *See* 177 F.3d at 1089-90. The ABA's 1922 proposal, which was introduced in Congress in December 1922, made any written arbitration provision in a "contract or maritime transaction or transaction involving commerce" valid, irrevocable, and enforceable. S. 67-4214 § 2 (1922); *accord* 47 ABA Reports 315 (1922). Ultimately, however, Section 2 was revised to refer to written arbitration provisions in "any

maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Assuming that this amendment was made in response to the protests of the International Seamen's Union, the Ninth Circuit concluded that Congress amended Section 2 to make clear that the FAA did not apply to any contracts of employment. *See Campbell Soup*, 177 F.3d at 1089-90.

In fact, the amendment of Section 2 was entirely independent of the response to the seamen's protest. The contract-of-employment exclusion was included in the arbitration bills introduced in 1923. *See* S. 68-1005 § 1; H.R. 68-646 § 1; *see also* 48 ABA Reports 287, 302 (1923) (noting that the ABA consented to the contract-of-employment exclusion in response to the seamen's protest). Although those bills contained an amended Section 1 thta included the exclusion, the language of Section 2 remained the same. *See* S. 68-1005 § 2; H.R. 68-646 § 2; *accord* 48 ABA Reports 302. Moreover, there was no mention of an amendment to Section 2 in the January 1924 joint hearing, and the House bill was enacted without the amended Section 2. *See* 65 Cong. Rec. H11081-82.

According to a letter from the chairman of the ABA committee that proposed the FAA, the amendment to Section 2 was suggested by a senator absent from the January 1924 joint hearing sometime after that hearing. *See* Letter from W.H. Piatt to Hon. Thomas J. Walsh, March 7, 1924, *reprinted in* 49 ABA Reports 283-84 (1924); *see also* 1924 Joint Hearing at 1 (noting that "Senator Walsh, of Montana, is detained at another hearing"). In addition, when this amendment was considered by the House, it was not treated as substantive. *See* 66 Cong. Rec. H3004 (Feb. 4, 1925). Moreover, far from disagreeing, the ABA committee stated that the change was a technical one, a simple "improvement in the language of the legislation." Letter from Piatt to Walsh, March 7, 1924, *reprinted in* 49 ABA Reports 283. Thus,

contrary to the Ninth Circuit's suggestion, the historical materials do not suggest that the amendment to Section 2 had anything to do with the contract-of-employment exclusion.

2. The Ninth Circuit also reads too much into the testimony at the 1923 Senate hearing in which the contract-of-employment exclusion was suggested. At that hearing, Senator Sterling, the sponsor of the FAA in the Senate, asked W.H. Piatt, the chairman of the ABA committee that proposed the FAA, whether he was aware of a letter the Senator had received from a constituent. The following colloquy ensued:

> Mr. PIATT. No, sir; but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen —
>
> Senator STERLING. Mr. Furuseth?
>
> Mr. PIATT. Yes; some such name as that. He has objected to it, and criticised it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of the bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing

> with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

1923 Joint Hearing at 9.

Quoting the last few sentences of this testimony, the Ninth Circuit concluded that the bill was not intended to apply to employment contracts of any sort. *See Campbell Soup*, 177 F.3d at 1089-90. It is not, however, clear that Mr. Piatt's testimony was so broad. Earlier, Piatt had stated that the bill was not intended to require an "industrial arbitration," which could be understood to be a reference to arbitration under collective bargaining agreements. Indeed, Senator Sterling appeared to understand the proposal in this way: later in the hearing, he referred to the witness's "suggested amendment in regard to the *labor associations*." 1923 Joint Hearing at 10 (emphasis added).

This conclusion is reinforced by a 1928 ABA proposal for a "United States Industrial Arbitration Act." 53 ABA Reports at 381. That proposal would have extended the FAA to cover arbitration provisions in written agreements "made by an employer or organization of employers *with an organization of employees*." *Id.* at 376 (emphasis added). As collective bargaining agreements are agreements between employers and organizations of employees, the ABA's committee on commerce—which in 1928 still included Julius Henry Cohen, the primary draftsman of the FAA *(see id.*; 1924 Joint Hearing at 15)—plainly understood the term "industrial arbitration" to refer to arbitration under collective bargaining agreements, not individual contracts of employment. Accordingly, there is some basis in the historical materials for the position that the contract-of-employment exclusion covers only collective bargaining agreements. *See, e.g., United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954);1 Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 11.22, at 11:6 (1999).

Furthermore, even if Mr. Piatt's testimony had clearly indicated *his* understanding that the ABA's proposal would not cover any individual employment contracts, it is by no means clear that his view was shared by the ABA as a whole. Certainly, the ABA's standing committee on commerce, which proposed the FAA, took a different view on whether the bill was intended to cover employment contracts. As indicated above, *see supra* pp. 19-20, the committee later said its original proposal was supposed to cover such contracts:

> From the foregoing it will appear that the Association originally favored the application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy . . . .

53 ABA Reports at 351.

The committee also noted that New York's arbitration statute "appl[ies] to *all* agreements to arbitrate, whether in the commercial or industrial field." 53 ABA Reports at 351 (emphasis added); *see also* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* § 32, at 108 n.24 (1930) ("It is clear that a future disputes agreement is not taken out of the application of the New York statute because it is in an employment contract.") (citations omitted). As the New York statute formed the model for the FAA, *see* S. Rep. No. 68-536, at 3, it follows that the ABA's original bill was also intended to cover arbitration provisions in employment agreements and that Mr. Piatt's suggestions to the contrary in the 1923 Senate hearing were either an idiosyncratic personal view or a disingenuous evasion. In either event, his testimony does not provide a basis for concluding that Congress or even the ABA intended the exclusion in Section 1 to cover all employment contracts.

3. In *Campbell Soup*, the Ninth Circuit also relied on a letter that Herbert Hoover sent to the Senate Committee on the Judiciary in 1923, which was reprinted in the 1924 joint

hearings. *See* 177 F.3d at 1090; *see also* 1923 Senate Hearing at 14. As noted above, *see supra* p. 18, this letter contains a sentence referring to the contract-of-employment exclusion: "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating, 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" Letter from Herbert Hoover to Hon. Thomas Sterling, Jan. 31, 1923, *reprinted in* 1923 Senate Hearing at 21. Focusing on the phrase "workers' contracts," the Ninth Circuit concluded that the exclusion was intended to cover all employment contracts. *See Campbell Soup*, 177 F.3d at 1090. This awkward phrase, which was written on the day of the Senate hearing in 1923, will not support the weight that the Ninth Circuit places upon it. As this Court has noted in an analogous context, the language of such an informal communication should not be dissected as if it were in the United States Code. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993).

4. In its *amicus* brief in the *Gilmer* case, the AFL-CIO cited some historical materials not relied upon by the Ninth Circuit. *See* AFL-CIO Br. at 16-24. None of the arguments drawn from those materials has merit.

a. The AFL-CIO noted that there was "nothing to indicate that labor's opposition was limited to the narrow range of labor contracts that would be excluded" under a narrow interpretation of the contract-of-employment exclusion. AFL-CIO Br. at 17-18. The basis for labor's objection to the FAA, the AFL-CIO asserted, was "the fear that weak unions, or individuals, would be compelled to submit to arbitration clauses, and that arbitral decision-makers would as a practical matter be under the control of the employers." *Id.* at 18 (citing 53 ABA Reports at 351-52). The AFL-CIO's brief cites, however, to views expressed in 1928 in support of this assertion. *See* 53 ABA Reports at 352 & n.*. Moreover, the

contemporaneous historical materials cited by the AFL-CIO do not speak at all about weak unions; they talk about the unequal bargaining power between workers and their employers. *See* Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203-04 (1923); Proceedings of the 45th Annual Convention of American Federation of Labor 52 (1925). This Court has, however, already rejected the suggestion that Congress did not intend to apply the FAA simply because of a disparity in bargaining power. *See Gilmer*, 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *see also* MacNeil, *American Arbitration Law* 90 & nn.47-48 (noting that Congress did not respond to concerns about unequal bargaining power in construction, freight, and insurance contracts). Thus, the AFL-CIO's suggestion that Congress included the contract-of-employment exclusion out of concern for unequal bargaining power is simply incorrect.

b. The AFL-CIO also observed that the subject matter of the 1924 joint hearing was "described as 'Arbitration of Interstate *Commercial* Disputes'" and that the testimony at the hearing "reflects the commercial nature of the bill." AFL-CIO Br. at 20 (quoting and emphasizing 1924 Joint Hearing at 1). The title of the 1924 hearing was, however, virtually the same as the title of the Senate hearing the year before even though the latter hearing was prior to the addition of the contract-of-employment exclusion. *See* 1923 Senate Hearing at 1 (hearing entitled "Federal Commercial Arbitration"). More fundamentally, as this Court has repeatedly recognized, the fact that the legislative history of a statute focuses upon one subject (here, commercial arbitration) does not mean that the statute is necessarily limited to that subject. *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 105, 115-16 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history . . . ."); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679

(1983) (noting that Congress' focus on one problem "does not create a 'negative inference' limiting the scope of the Act to the specific problems that motivated its enactment").

c. Finally, the AFL-CIO relied on the ABA's 1928 proposal for an industrial arbitration act and a 1942 proposal to amend the FAA to extend to "'labor controversies.'" AFL-CIO Br. at 23-24 (quoting 88 Cong. Rec. 2072). As this Court has repeatedly stressed, however, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Jones v. United States*, 526 U.S. 227, 236 (1999) (quotations omitted); *accord Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *United States v. Price*, 361 U.S. 304, 313 (1960). Moreover, such post-enactment history is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp.*, 496 U.S. at 650.

In any event, neither the ABA proposal nor the 1942 proposed amendments offers the AFL-CIO's expansive interpretation of the contract-of-employment exclusion any support. As noted above, the ABA proposal for an industrial arbitration act dealt with collective bargaining agreements, not individual employment contracts. *See supra* pp. 24-25. Similarly, the 1942 proposed amendments would have extended the FAA to cover written arbitration agreements "entered into by *a labor organization* with an employer or group of employers engaged in commerce *or by one labor union with another labor union*." 88 Cong. Rec. 2072 (emphasis added).[6] Thus, the post-enactment history cited by

[6] Indeed, this proposal appears to have been motivated by concerns over the enforcement of agreements to engage in interest arbitration—that is, arbitration of the terms of a new agreement rather than arbitration of the meaning of the terms of an existing agreement—not conventional (continued...)

the AFL-CIO provides more support for the position that the contract-of-employment exclusion was limited to collective bargaining agreements than it does for the Ninth Circuit's expansive interpretation—thereby demonstrating why the legislative history of the contract-of-employment exclusion is too confusing and ambiguous to provide any useful guidance. The exclusion should instead be interpreted in light of its plain language, the structure of the FAA, and the applicable rules of construction, all of which preclude the anomalous interpretation adopted below.

[6] (...continued)
arbitration of disputes arising under individual employment contracts. *See* 88 Cong. Rec. at 2072 (citing a 1940 report of the New York State Legislative Committee on Industrial and Labor Relations); *see also Report of the New York State Legislative Comm. on Industrial and Labor Relations* 38-41 (1940) (noting that New York's arbitration law did not cover interest arbitration at that time). Accordingly, the 1942 proposed amendments would have extended the FAA to cover agreements to arbitrate "controversies concerning past, present, *or future* rates of pay, wages, hours of employment." 88 Cong. Rec. 2073 (emphasis added).

CONCLUSION

For the reasons stated above, this Court should interpret the exclusion in Section 1 of the Federal Arbitration Act to be limited to contracts of employment for individuals engaged in interstate or international transportation and reverse the decision of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Division of Labor Standards Enforcement, Department of Industrial Relations, State of California ("DLSE"), headed by its Chief, the California Labor Commissioner, is the agency charged with the enforcement of California's wage and hour laws, as well as other state labor laws enacted for the protection of workers. The agency administers an elaborate state-wide administrative system designed to enable workers to promptly and efficiently vindicate their rights to the correct and full payment of minimum, overtime, and contract wages owed to them under California's labor laws. The machinery set up to administer this system consists of district offices throughout the state that intake, process, adjudicate, and enforce wage claims, bureau offices throughout the state comprised of field deputies that investigate compliance with the wage and hour laws, a staff of state-wide senior administrative officers that oversees and supervises the operations of the DLSE, and a state-wide staff of attorneys charged with providing the legal expertise and resources needed to implement, apply, administer, and enforce California's labor laws.

In the arena of wage enforcement, the DLSE administrative system is an effective tool for insuring labor law compliance and expeditiously recovering and collecting wages. California law guarantees every worker access to that system by denying legal effect to an arbitration

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[1] Both parties have consented to the filing of this brief, and letters of consent have been filed with the Court. No counsel for a party had any role whatever in the authoring of this brief, and other than the named amicus and its counsel no person has made any monetary contribution to the preparation or submission of this brief.

clause that purports to waive a worker's right to enforce a wage claim in an administrative or judicial forum. In light of the ever expanding proliferation of employment agreements containing arbitration clauses, if the Federal Arbitration Act is applied to the states it will nullify access to the DLSE and inevitably result in the dismantling of an administrative scheme which is far superior to arbitration in securing and enforcing a wage earner's rights to proper compensation under California law. Since the DLSE believes that Congress never intended such a result, it has a substantial interest in expressing its views on this subject.

INTRODUCTION

As a condition of employment, all employees of Petitioner Circuit City Stores, Inc. ("Circuit City") must agree in writing to arbitrate virtually any employment-related claim they may have against Circuit City. The underlying issue presented by this case is not whether the arbitration clause contained in the employment agreement of Respondent Saint Clair Adams ("Adams") is valid and enforceable, but rather whether the determination of the question of the clause's validity and enforceability is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., or by state law.

Despite explicit statutory language excluding "contracts of employment" from the reach of the Congressional commerce power exercised in enacting the FAA, 9 U.S.C. § 1, and despite the well recognized historical role of the states as the protectors of workers rights and arbiters of the remedies (judicial, administrative, or arbitral) best suited to enforcing those rights, Circuit City and its *amici* argue that the FAA wrests this traditional protective power from the states and turns it over to employers.

The position fails to recognize that in the arena of workers' rights the FAA was not intended to alter the balance of power between the federal government and the states, and more particularly, that the FAA's exclusion for "contracts of employment" was meant to preserve the central role of the states as the primary guardians of the rights and protections afforded to workers.

SUMMARY OF ARGUMENT

When Congress enacted the FAA in 1925, it specifically intended to exclude all contracts of employment from the reach of the FAA. To accomplish this objective, Congress inserted an exclusionary clause into the FAA which provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The clause contains the jurisdictional language "engaged in interstate commerce" and those words express the full extent of Congress's 1925 commerce power over "contracts of employment." Congress appended that exclusionary clause to the definition of "commerce" in § 1 of the FAA in order to withdraw all of the commerce power it possessed over "contracts of employment" from the scope of the commerce power it was exercising under the FAA.

The effect to be accorded the words "engaged in interstate commerce" when used in an exclusionary clause is different from the contemporary effect accorded to those words when used in an inclusionary clause. In an exclusionary clause that predates the 1937 expansion of the commerce power, the words "engaged in interstate commerce" are construed broadly rather than narrowly

because they operate to limit rather than expand compressional power. Since the modern narrow meaning of "engaged in interstate commerce" is likewise concerned with avoiding an improper expansion of congressional power, that narrow meaning cannot foreclose an inquiry into whether the 1925 exclusionary language was intended to be read broadly so as to exclude all "contracts of employment" from the reach of the FAA. Petitioner's argument that such an inquiry is precluded is therefore unsound.

The text, structure, and context of the FAA § 1 exclusion, as well as its legislative history and the evident specific intent of Congress, show that the language of the exclusion was selected by Congress to implement the Congressional objective of excluding all contracts of employment from the scope of the FAA and that consequently it should be given that effect. Contrary to Petitioner's arguments, all of the language used by Congress was designed to serve the exclusionary purpose, and none of it was superfluous. The jurisdictional words "engaged in interstate commerce" were used by Congress to unequivocally express the full extent of Congress's 1925 commerce power over contracts of employment, and the rule of ejusdem generis did not apply and could not be used to circumscribe their reach. Since the full commerce power of Congress over contracts of employment was placed within the exclusion, that entire portion of Congress's commerce power was excluded from the scope of the commerce power exercised under the FAA. This conclusion is unequivocally supported by the legislative history. Since the FAA § 1 exclusion embodies a distinct and important policy aimed at promoting flexibility in the area of contracts of employment, that policy

should be implemented to ensure that the states will not be divested of their traditional role as the principal protectors of the rights of workers.

ARGUMENT

I. THE TEXT OF THE FAA § 1 EXCLUSION EXPRESSES CONGRESS'S INTENT TO WITHDRAW FROM THE SCOPE OF THE COMMERCE POWER EXERCISED TO ENACT THE FAA ALL "CONTRACTS OF EMPLOYMENT" WITHIN THE REACH OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

Section 2 of the FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable. . . . "

> "Section 2 makes 'valid, irrevocable, and enforceable' only two types of contracts: those relating to a maritime transaction and those involving commerce."

Bernhardt v. Polygraphic Co., 350 U.S. 198, 200 (1956). As this Court emphasized in *Bernhardt*, the Senate Committee Report on the FAA bill, " . . . S. Rep. No. 536, 68th Cong., 1st Sess. p. 2, states that § 1 defines the contracts to which 'the bill will be applicable.' " *Id.* at 201. Section 1 of the FAA defines "[m]aritime transactions" and "commerce," and then concludes with an exclusionary clause specifically addressed "to contracts of employment."

In *Southland Corporation v. Keating*, 465 U.S. 1 (1984), this Court took cognizance of the § 1 exclusion, and in doing so framed the basic issue under consideration in this case.

> "We note that in defining 'commerce' Congress declared that 'nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1."

Southland Corporation, 465 U.S. at 11 n.5. To put the matter more directly, the question presented is: What "contracts of employment" did Congress withdraw from the "commerce" power it exercised when in enacted the FAA? Did it withdraw all contracts of employment, or did it withdraw only some?

The answer to that question lies in the text, structure, and context of the language used by Congress. When Congress used the words "of seamen, railroad employees, or any other class of workers engaged in interstate commerce" to qualify the term "contracts of employment," it used language intended to convey its full constitutional commerce power over contracts of employment, and when it then inserted that language into an exclusionary clause, as opposed to an inclusionary one, it did so in order to withdraw this entire portion of its power from the actual power exercised in enacting the FAA. That withdrawal specifically placed all "contracts of employment" outside the purview of the FAA, and permanently foreclosed the use of § 2 of the FAA to enforce an arbitration provision contained in any such contact. "Sections 1, 2, and 3 are integral parts of a whole." *Bernhardt*, 350 U.S. at 201.[2]

---

[2] Once "contracts of employment" are excluded from the definition of "commerce" under § 1 of the FAA, such contracts cannot come within the purview of § 2 even if the scope of the commerce power under the latter section expands with the passage of time. Thus, even though the term "contract evidencing a transaction involving *commerce*" may expand to reach certain local transactions which merely affect interstate commerce, *see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), that expansion can never extend to "contracts of employment" because by definition such contracts are no longer included within the meaning of "*commerce*" under § 1.

The position that only some employment contracts are excluded must necessarily rest on the premise that the language of the § 1 exclusion manifests something less than Congress's entire 1925 commerce power over contracts of employment; in that case it is possible to argue that not all classes of workers were excluded and that piecemeal application of the "engaged in commerce" language to determine which classes were and which were not excluded is appropriate. That position, however, is refuted by the statute's text, structure, and context, by the specific Congressional intent and the legislative history of the exclusion, and by the policies underlying the exclusion's purpose. Congress utilized language calculated to effectuate a complete exclusion of "contracts of employment" from the reach of the FAA, and thereby entirely obviated the possibility and pr[illegible]ety of piecemeal exclusion determinations.

A. Congress Inserted Jurisdictional "Commerce Power" Language Into The FAA § 1 Exclusion For The Purpose Of Spelling Out That Under The FAA It Did Not Intend To Exercise Any Of The Commerce Power It Possessed Over "Contracts Of Employment."

At the outset, it is important to recognize that Congress used jurisdictional "commerce power" language in delineating the FAA § 1 exclusion. In particular, the court invoked the phrase "engaged in . . . interstate commerce."

9 U.S.C. § 1. This Court's commerce power jurisprudence shows that the words "engaged in commerce" are invariably incorporated into an inclusionary clause in a statute to indicate how much commerce power Congress intends to exercise.

> "The question . . . is how far Congress intended to extend its mandate under the Clayton [Act] [15 U.S.C. §§ 14 and 18] and Robinson-Patman Act [ ] [15 U.S.C. § 13(a)]. The answer depends on the statutory language read in light of its purposes and legislative history."

Citation omitted. *Gulf Oil Corp. v. Capp Paving Co.*, 419 U.S. 186, 197 (1974) ("in commerce"). "It is clear that the purpose of the [Fair Labor Standards] Act [29 U.S.C. §§ 206 and 207] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling v. Jacksonville Paper Co.* 317 U.S. 564, 567 (1943) ("engaged in commerce"). "Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged in is part of interstate commerce." *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 478 (1914) (Federal Employers' Liability Act of 1908 ("FELA"), 35 Stat. 65: "employed in [the interstate] commerce" of the carrier while the carrier is "engaging in [interstate] commerce").

When, as here, the commerce power jurisdictional language is placed in an exclusionary clause, however, it has an entirely different signification. Instead of indicating how much power Congress intends to use, the language now signals just the opposite, namely how much power Congress intends *not to use*. In other words, the inverted context into which the jurdisctional language is transposed radically alters its customary import and operative effect, and requires a careful reconsideration of

the guidelines normally employed to determine what effect the jurisdictional language should be given.

Historically, two considerations have dictated a narrow reading of the words "engaged in commerce" when used in an inclusionary clause defining the scope of the power exercised by Congress. One is the concern for preserving the structure of our federal system of government and avoiding incursions on the powers of the states unless such were plainly intended by Congress.

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly . . . [B]earing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 [Federal Trade Commission Act, § 5(a), 15 U.S.C. § 45(a).] radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated."

FTC v. Bunte Bros., Inc., 312 U.S. 349, 351 (1941). Citations omitted.

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. . . . Congress did not exercise in this Act [Fair Labor Standards Act] the full scope of the commerce power."

Walling v. Jacksonville Paper Co., 317 U.S. 564, 570 (1943). Citations omitted. The other consideration, applicable to the era preceding the expansion of the commerce power, is expressed in the court's practice of giving a statute a construction narrow enough to avoid constitutional infirmity. Thus, in the case of *Baltimore & Ohio R.R. Co. v. ICC*,

221 U.S. 612 (1911), involving the construction of "An Act to Promote the Safety of Employees . . . ," Act of March 4, 1907, 34 Stat. 1415, the court concluded that although the words "employees, engaged in the transportation of persons or property by railroad in [interstate commerce]" extended to the intrastate activities of the employees, they did so only insofar as the intrastate activities were indivisible from the interstate activities, which activities as a whole, the court found, were within the reach of the commerce power. *Baltimore v. Ohio R.R. Co. v. ICC*, 221 U.S. at 616-619.

Neither of the foregoing considerations applies, however, when the words "engaged in commerce" are used in an exclusionary clause. In that context, a narrow reading of the words is not required to avoid an incursion on state power; on the contrary, when the words "engaged in commerce" are embedded in an exclusionary clause, it is a broad reading of those words that will limit congressional power, further the interests of the federal system, and avoid an unintended and unwarranted intrusion upon the authority of the states. And that, obviously, is because a broad reading confirms the substantial dimensions of the power Congress has chosen not to exercise but to leave to the states. Likewise, if one adopts the appropriate 1925 perspective, it is quite evident that a narrow reading of the language would not have been required to salvage the statute's constitutionality; rather, as before, it is a broad reading of the "engaged in commerce" language that would have confirmed a constricted exercise of power by the Congress and served to buttress the constitutional validity of the statute.

In sum, as the foregoing analysis makes clear, the very considerations which invite a narrow reading of "engaged in commerce" when used in an inclusionary

clause dictate a broad reading of those words when they appear in an exclusionary clause. It is with this backdrop in mind, that one must assess how much commerce power Congress chose not to exercise when it framed the FAA § 1 exclusion. Absent compelling contrary indications, that backdrop should strongly militate against reaching the conclusion either that Congress did not recite its entire commerce power over contracts of employment in the exclusionary clause or that, if it did, Congress intended that recital to be fixed in time and not govern any future expansion of the commerce power. The 1925 Congress should not be lightly understood to have permanently parted with all or virtually all of its 1925 commerce power over contracts of employment with the intent that some unrealized and never exerted power over contracts of employment, that might materialize sometime in the future, should be applied to displace and override the powers that would otherwise have been preserved to the states. *Cf. FTC v. Bunte Bros., Inc.*, 312 U.S. at 354:

> "The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over the myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far reaching import as is involved here, ought to await a clearer mandate from Congress."

At this point, it is evident that the foregoing analysis serves to completely refute the argument of Petitioner and its *amici* that because in contemporary commerce power jurisprudence the words "engaged in commerce" have a fixed meaning that is narrower and more restrictive than the words "involving commerce" or "affecting commerce," that narrower meaning should be imported

into the "engaged in commerce" language used in the FAA § 1 exclusion. Obviously, that argument is fundamentally flawed: first, it completely ignores the significance of the fact that the words in § 1 of the FAA appear in an exclusionary clause as opposed to an inclusionary clause; second, it fails to recognize the fact that in 1925 (prior to the revolutionary expansion of the commerce power), Congress could readily have used both the words "involving commerce" and the words "engaged in commerce" to delineate its full commerce power under the Constitution, the former in an inclusionary clause reaching all "contracts" other than those excluded from the definition of "commerce" and the latter in an exclusionary clause precisely excluding from that definition all "contracts of employment" within the reach of the commerce power; and third, it is designed to avoid addressing the question of whether the "engaged in commerce" language was intended to completely withdraw all contracts of employment from the scope of the commerce power exercised under the FAA. The argument of Petitioner simply seeks to leap past the threshold question of whether § 1 effects a complete withdrawal of commerce power over contracts of employment, and to treat the issue as one confined solely to determining which particular classes of workers were intended to be excluded from the FAA by the words "engaged in interstate commerce."

Plainly, Petitioner cannot evade the critical threshhold issue of total exclusion through the simple expedient of focusing its attention on an issue which does not even arise if it is determined Congress intended to exclude all "contracts of employment" and not just specific classes of employees. In other words, if all contracts of employment

are excluded from the reach of the FAA, then the question of which classes of workers fall within the exclusion of § 1 is a non sequitur – since all employment contracts are outside the purview of the FAA there are no class-specific exclusion or inclusion determinations to be made. To proceed, as Petitioner has done, directly to an issue which may never arise, is to beg the very question to be answered.[3]

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[3] It is, of course, possible to focus on the question of which classes of workers are excluded and to come to the conclusion that all classes of workers – and therefore all contracts of employment – are excluded. This is the approach followed by the Ninth Circuit Court of Appeals in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999). Given that "involving commerce" was set out in an inclusionary clause while "engaged in interstate commerce" was contained in an exclusionary clause, and that in 1925 Congress did not differentiate between "involving" and "engaged in" for commerce power purposes, it is entirely permissible to treat both terms as coextensive for purposes of determining what contracts are reached by the "commerce" power exercised under the FAA; such an approach is merely an alternative implementation of Congress's specific intent that the commerce power, even if expanded, not encompass contracts of employment. Nevertheless, the more accurate construction of the statutory text, as previously pointed out, is that pursuant to the § 1 exclusion all contracts of employment were withdrawn from the § 1 definition of "commerce."

B. The Text, Structure, And Context Of The FAA § 1 Exclusion Demonstrate That the Exclusion Broadly Describes Congress's Entire 1925 Commerce Power Over "Contracts Of Employment" For The Purpose Of Excising That Power From The Power Asserted Over All Other "Contracts" In Enacting The FAA.

In delineating the exclusion for "contracts of employment" in § 1 of the FAA, Congress chose to use the following language: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. It has been suggested by some that if Congress had actually meant to exclude all contracts of employment from the FAA, it would have used either the phrase "nothing herein contained shall apply to contracts of employment" or the phrase "nothing herein contained shall apply to contracts of employment of any class of workers engaged in interstate commerce." The contention is that either of these two phrases would have been more appropriate for effecting a complete exclusion, and that consequently Congress must have intended to exclude something less than all contracts of employment. The contention is misplaced. As will appear from the discussion which follows, Congress plainly selected the more comprehensive exclusionary language it used because such language was best tailored to accomplish Congress's objective of excluding all "contracts of employment" from the scope of the commerce power exercised under the FAA.

1. In *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908) (the first employer liability case), the Court struck down the initial version of the statute eventually reenacted as the FELA; the Court declared the statute unconstitutional on the ground that its regulatory reach was not limited tc

those railroad employees whose activities were actually linked to interstate commerce. In the aftermath of *Howard*, at least with respect to the regulation of employees, Congress was keenly aware of the need for precision in delineating the scope of the jurisdictional authority it intended to exercise under the commerce power. It follows that in enacting the FAA, Congress chose the statute's jurisdictional language carefully.

The emanations from *Howard* must clearly have dictated Congress's decision not to use just the words "nothing herein contained shall apply to contracts of employment" in the FAA § 1 exclusion. Unaccompanied by appropriate jurisdictional language, those words might easily have been construed by the courts as merely providing assurance that the FAA did not extend to contracts of employment outside the reach of the commerce power. Such a reading of the words would have completely frustrated the accomplishment of Congress's very specific intent to also exclude those contracts of employment which were within the reach of its commerce power. Thus, Congress proceeded to choose language which was much better suited to accomplishing its precise objective.

2. Congress chose to insert the jurisdictional language "engaged in interstate commerce" into the § 1 exclusionary clause because it expressed Congress's full commerce power over contracts of employment, and this was the power Congress wanted excluded from the commerce power being exercised under the FAA.

In *Ill. Cent. R. R. Co. v. Behrens*, 233 U.S. 473 (1914), the Court observed that, while the particular language of the FELA did no not go so far, where a railroad employee's interstate and intrastate employment activities were as a practical matter inseparable and indivisible, the Congress had authority under the commerce

power to regulate the railroad's liability to the employee for personal injuries sustained while actually performing purely intrastate activities. In support of this proposition, the Court cited the decision in *Baltimore & Ohio R.R. Co. v. ICC*, 221 U.S. 612 (1911). There, as previously noted, the Court had held that under the language of "An Act to Promote the Safety of Employees . . . ," which extended to "*employees, engaged in* the transportation of persons or property by railroad in [interstate commerce]," the Congress had exercised its constitutional authority to regulate the intrastate activities of employees that were indivisible from the employees' interstate activities. Moreover, subsequent to the *Behrens* case, the Court adopted an expanded interpretation of the similar though somewhat inexact language of the FELA so as to apply it to a cook who at the time of his injuries was rendering services exclusively intrastate. *Philadelphia, B. & W. R. Co. v. Smith*, 250 U.S. 101 (1919). This expanded application remained in effect until 1931 when the Court returned to the narrower standard applied in *Behrens* and *Shanks v. Del., Lackawanna, W. R.R. Co.*, 239 U.S. 556 (1916). See *McLeod v. Threlkeld*, 319 U.S. 491, 498 (1943) (Murphy, J., dissenting), discussing the 1931 retreat from the *Smith* standard.

In 1925, therefore, the use of the words "engaged in interstate commerce" would have been understood by Congress as reaching to the full extent of the commerce power. Moreover, the words "engaged in" would have been the words that Congress would have considered appropriate in framing a Commerce Clause provision directed solely at employees. At the time of the enactment of the FAA, commerce was defined essentially as follows:

> "Commerce consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities."

Craft v. Campbell Soup Co., 177 F.3d at 1086, quoting *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918). Contracts of employment would not involve a purchase, sale, or exchange of commodities; as in the case of transporting persons or property, participation by an employee in purchase, sale, or exchange activities would occur only as a result of an employee's contract with an employer to "engage in" such activities on the employer's behalf. Thus, in the "contracts of employment" context, the use of the words "engaged in interstate commerce" covered the full spectrum of employee activities within the reach of the 1925 commerce power. Consequently, by using those jurisdictional words in the FAA § 1 exclusion, Congress had expressed the full power available to it under the Commerce Clause with respect to contracts of employment.

3. Congress chose to insert the specific references to "seamen" and "railroad employees" and the specific classification terminology "any *other* class" into the FAA § 1 exclusionary language because it wanted to illuminate the breadth of the exclusion and to make plain that it was not excluding particular categories or classes of workers, which would have invited piecemeal exclusionary determinations, but rather that it was excluding contracts of employment in their entirety, thereby rendering any sort of piecemeal exclusionary assessments inapposite. If in § 1 Congress had simply used the phrase "of any class of employees engaged in interstate commerce" after the words "contracts of employment," that phrase would most definitely have invited, and indeed demanded, case by case determinations as to who was and who was not excluded; given the lack of comprehensiveness in the

exclusionary formulation, it would have been virtually impossible for that phrase to be construed from the outset as excluding all contracts of employment. Ultimately, after several applications of the language (and even seamen and railroad employees would have had to test the provision since they would not have been specifically excluded), the courts might have concluded that all contracts of employment were excluded; but just as easily, as evidenced by the current state of affairs, the courts might have concluded that only workers "engaged in interstate commerce," as that phrase was understood in 1925, were excluded.

It was in an effort to avoid this problem that Congress used the more comprehensive, all-inclusive language found in the current exclusionary clause. Congress identified the two classes of workers which it extensively regulated, and indeed essentially the only two classes it regulated at all, "seamen" and "railroad employees," and inserted them into the FAA § 1 exclusion to indicate that the contracts of employment of these two extensively regulated classes – and hence the two classes most clearly within the reach of Congressional power – would not be within the scope of the commerce power exercised under the FAA. Congress then inserted the words "any *other* class of workers" in § 1 to indicate that the contracts of employment of any other classes of workers that might be within the reach of the Congressional commerce power would also not come within the scope of the power exercised under the FAA. It is evident that Congress used the specific class references and the all encompassing "any other class" in order to leave no doubt as to its objective of excluding all contracts of employment from the reach of the FAA.

Given this backdrop, it is clear that in the instant statutory context the ejusdem generis maxim cannot be invoked to narrow the scope of the § 1 exclusion. To begin with, the maxim only applies when the specific words in a list are needed to clarify the general category which follows them in order to determine whether certain unspecified items fall within the general category. This use of the maxim establishes that the specific words have a purpose and are not mere surplusage, and also serves to give specific contours for the application of the general category to the unspecified items. See 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 47:17 (6th ed. 2000). But where, as here, the specific legislative intent is not to delimit a general category to be applied on a case by case basis, but rather is to use the specific words to illuminate the breadth of the general category in order to effectuate a complete exclusion of the object of the list, in this case "contracts of employment," then the specific words cannot be deemed surplusage and the ejusdem generis maxim does not apply. That this was the legislative intent in the present statutory context is confirmed by the fact that the rule of ejusdem generis cannot be correctly and intelligibly applied to the provisions of § 1 of the FAA.

The court that first applied the rule of ejusdem generis to the interpretation of § 1 of the FAA did so precisely because it failed to recognize and address the threshold statutory construction issue presented by the language of the § 1 exclusion, namely whether or not all contracts of employment are excluded from the reach of the FAA. *Tenney Eng'g, Inc. v. United Elec. & Mach. Workers of Am.*, 207 F.2d 450 (3rd Cir. 1953). Notably, the *Tenney* decision has become the foundation upon which virtually all of the other Courts of Appeals decisions adopting a

narrow construction of § 1 have been built. Since the *Tenney* analysis of the § 1 exclusion will not withstand scrutiny, all of the appellate decisions which rely on *Tenney* are likewise fundamentally flawed.

The *Tenney* court never directly examined the question of whether § 1 was intended to exclude all contracts of employment. It bypassed that question, and simply assumed that the exclusion called for case by case determinations of which classes were excluded and which were not. In *Tenney*, a stay pending arbitration was sought by a union representing employees "engaged in the manufacture of goods for sale in interstate commerce." *Tenney*, 207 F.2d at 451. From the point of view of the *Tenney* court, therefore, the issue was "whether the . . . employees . . . are to be regarded as a 'class of workers engaged in foreign or interstate commerce' within the meaning of the exclusionary clause." *Id.* at 452. To resolve this issue, the court determined that the question it had to answer was whether the phrase "workers engaged in foreign or interstate commerce" as used in § 1 of the FAA should be confined to the 1925 contours of the commerce power or whether it should be extended to the expanded contours of the 1953 commerce power. *Id.*

To assist in answering the question it posed, the *Tenney* court invoked the rule of ejusdem generis and then proceeded to misapply it. The court reasoned that because "seamen" and "railroad employees" are engaged directly in the movement of interstate and foreign commerce as "transportation workers" the general phrase "engaged in foreign or interstate commerce" as applied to other classes of workers was intended to be limited solely to other transportation workers similarly engaged in interstate commerce. However, in focusing specifically on the "transportation" characteristic of seamen and railroad

employees as a means of qualifying the general term "engaged in foreign or interstate commerce," the court failed to abide by a critical tenet of the ejusdem generis maxim: namely, that the characteristic selected from the specific words must bear some logical policy relationship to the object of the statutory provision in which the list of words is contained.

> "In most instances there is a wide range of ways in which classes could be defined, any of which would embrace all of the members in an enumeration. Germaneness to the subject and purpose of the statute, viewed in terms of legislative intent or meaning to others, is the basis for determining which among various semantically correct definitions of the class should be given."

2A Norman J. Singer, Statutes & Statutory Construction § 47:18 at 289. Here, the § 1 exclusion is designed to preclude use of the FAA to enforce arbitration clauses in "contracts of employment." But there is no logical or intelligible reason why that preclusion should be understood as having been limited to transportation workers; in other words, the fact that seamen and railroad employees happen to be engaged in commerce as "transportation workers" is without significance in relation to the object of the statute. Although the *Tenney* court points to the fact that in 1925 seamen and railroad employees were already subject to certain statutory arbitration provisions, it is evident that the existence of such provisions was not a function of the status of seamen and railroad employees as transportation workers. Moreover, the applicability of specialized arbitration provisions to certain groups of workers is plainly not itself a characteristic of being a worker engaged in interstate commerce. In

sum, consideration of the reference to "seamen" and "railroad employees" in the context of the § 1 exclusion fails to reveal any common characteristic which would rationally justify narrowing the general phrase "engaged in interstate commerce." "Where a general term appears . . . with specific terms not suggesting a class, the rule of ejusdem generis does not apply." 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 47:20 at 293. It follows that *Tenney* erred when it applied the ejusdem generis maxim to the § 1 exclusion.

Despite the fact that *Tenney* misapplied the ejusdem generis doctrine and that it never squarely addressed the issue of total exclusion of contracts of employment, every Circuit Court of Appeals that has interpreted the scope of § 1 of the FAA narrowly has relied on *Tenney*, either directly or indirectly, for the proposition that § 1 was not intended to exclude all contracts of employment.[4] Not one of these courts has undertaken an independent analysis of the issue of exclusion which goes beyond the basic inquiry pursued in *Tenney*, and not one of them has ever subjected the *Tenney* court's application of the ejusdem generis maxim to any sort of rigorous scrutiny. It follows that if the *Tenney* analysis of the exclusion issue is fundamentally unsound, then these decisions are fundamentally unsound as well.

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[4] See Brief for Petitioner at 11 n.4, listing one such decision from each of the Circuit Courts adopting a narrow interpretation of the § 1 exclusion.

C. The 1947 Reenactment And Codification Of The FAA Confirmed And Reinforced The Intent Of The 1925 Congress To Exclude All Contracts Of Employment From The Reach Of The FAA.

It is argued that because the FAA was reenacted and codified in 1947, see Act of July 30, 1947, Ch. 392, § 2, 61 Stat. 669, 670-674, the FAA § 1 exclusion should be interpreted in accordance with the 1947 Congressional intent underlying the reenacted statute. First, as one *amicus curiae* advancing this argument candidly concedes, since the 1947 reenactment did not materially change the text of the FAA, " . . . it would ordinarily be inappropriate to read any significance into Congress's repeal and reenactment [since] to do so would constitute a 'drag upon codification,' HENRY H. HART, J. & ALBERT M. LACKS, THE LEGAL PROCESS 1403 (tent. ed. 1958). . . . " Brief of Credit Suisse First Boston As Amicus Curiae in Support of Petitioner at 12.

Second, since there was no textual change in the FAA, there is no basis for inferring a changed intent on the part of Congress. The argument that is made focuses on the fact that the revolution in "commerce power" jurisprudence took place between 1925 and 1947, and that as a result of that revolution the courts proceeded to draw a distinction between the words "engaged in commerce" and the words "affecting commerce," conferring a narrow reading on the former and a broad one on the latter. But as has been repeatedly pointed out, this would not have had and did not have any effect on the words "engaged in interstate commerce" as used in § 1 of the FAA. That is because those words were set out in an exclusionary, not inclusionary, clause, and were intended to express Congress's full commerce power over contracts of employment in order to exclude that power completely

from the power exercised under the FAA. In other words, any limitations placed by the courts on the words "engaged in commerce" in an inclusionary context would not have affected the broad reading of those words in an exclusionary context. Thus, in 1947 Congress would not have had any reason to believe that the "engaged in interstate commerce" language in § 1 would not be given the broad exclusionary effect intended by the 1925 Congress.

Moreover, the cases which had interpreted the § 1 exclusion prior to 1947 had either held or implied that all contracts of employment were outside the reach of § 2 of the FAA. In *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944), the Sixth Circuit specifically held that the § 1 exclusion applied to the entire FAA and not just to § 2, and that § 1 covered and therefore excluded all contracts of employment. In *Watkins v. Hudson Coal Co.*, 51 F.2d 311 (3rd Cir. 1945) and *Donohue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1941), the Third Circuit, following a slightly different path, concluded that the § 1 exclusion applied only to § 1 and to the reach of § 2 but did not apply to § 3; the court held that under § 3 it could stay proceedings pending arbitration of claims arising under the FLSA, even though the claims were excluded from the reach of § 2 by virtue of the § 1 exclusion. Thus, the court necessarily determined that by reason of § 1, § 2 could not be used as the basis for enforcing arbitration clauses in contracts of employment. Shortly thereafter, the Third Circuit concluded that the § 1 exclusion did indeed apply to the entire FAA and specifically held that all contracts of employment were excluded from the FAA. *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Pa. Greyhound Lines*, 192 F.2d 310 (3rd Cir. 1951). This change of position was in fact triggered by the

catchline placed above § 1 at the time the FAA was reenacted and codified in 1947. Thus, the case law specifically reinforced and implemented the intent of the 1925 Congress to exclude all contracts of employment from the reach of the FAA. It is therefore clear that the arguments against exclusion advanced on the basis of the 1947 codification are entirely without force.

D. The Legislative History Supports The Conclusion That The 1925 Congress Intended To Withdraw All Of Its Commerce Power Over Contracts Of Employment From The Scope Of The Commerce Power Exercised Under The FAA.

The legislative history is thoroughly examined in the Ninth Circuit's decision in *Craft v. Campbell Soup Co.*, 177 F.3d at 1089-1090. See also Mathew W. Finkin, *"Workers Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996). That history shows that the § 1 exclusion was inserted into the bill that became the FAA in order to allay concerns about the application of the FAA to workers and to make it absolutely plain that the commerce power being exercised under the FAA was not intended to include any of the commerce power that Congress had over workers and their contracts of employment. This clear and unmistakable history supports the conclusion that all contracts of employment were intended to be excluded from the FAA.

II. THE POLICY UNDERLYING THE FAA § 1 EXCLUSION IS ONE OF PRESERVING TO BOTH THE STATES AND THE FEDERAL GOVERNMENT THE FLEXIBILITY TO DETERMINE WHEN ARBITRATION IS AN APPROPRIATE REMEDY FOR THE IMPLEMENTATION OF WORKERS' RIGHTS AND PROTECTIONS.

A. The Policy Of Preserving Flexibility To Both The States And The Federal Government In The Context Of Contracts Of Employment Is Distinct From And Not Displaced By The Policy Favoring Arbitration In Other Areas.

The view that all contracts of employment should be excluded from the reach of the FAA is neither hostile nor inimical to the national policy favoring arbitration. The view simply expresses a different policy which finds its source in § 1 of the FAA instead of § 2. The § 1 policy seeks to accord both the states and the federal government flexibility in determining when and to what extent a judicial, administrative, or arbitral procedure, or a combination thereof, is best suited to the effectuation of workers' rights and protections.

At the time of the enactment of the FAA, the Congress had already statutorily implemented special arbitral procedures for seamen and railroad employees. See Shipping Commissioners Act of 1872, Ch. 322, 17 Stat. 262 and Transportation Act of 1920, Ch. 91, 41 Stat. 469. Thus, Congress was already aware of the need to specially tailor remedies for workers in the employment context. This awareness was consistent with its intent, as expressed in the FAA, not to subject workers and contracts of employment to a single, uniform arbitral scheme applicable to every conceivable employment relationship in every conceivable regulatory context. In other words, the Congress reserved to a future date the determination

of when, where and to what extent it would impose arbitral remedies on particular groups of workers.

The Congress was also necessarily aware of the traditional and paramount role of the states in providing protections to workers. Aware of its own need for flexibility in the limited areas where it regulated employment, the 1925 Congress most certainly had no intention of divesting the states of their authority to exercise flexibility in their areas of traditional employment regulation. Thus, Congress carved out contracts of employment from the reach of the FAA in order to preserve flexibility for both the states and for itself.

The policy of flexibility embodied in § 2 with respect to contracts of employment is not inferior or subordinate to the policy favoring arbitration embodied in § 1 with respect to other contracts. Each policy operates in its own independent sphere and neither policy can dictate how the other policy is to be applied. Consequently, the policy favoring arbitration contained in § 2 cannot be invoked to govern or control the effect to be given the policy of flexibility contained in § 1. It follows that the scope of the § 1 exclusion must be determined independently of the national policy favoring arbitration.

B. Implementation Of The Policy Of Flexibility Embodied in § 1 Of The FAA Is Essential To Preserving The Ability Of California To Effectively Protect And Enforce The Rights Of California Workers.

The value of preserving to the states the flexibility to determine when arbitration or some other administrative or judicial procedure is best suited to effectively vindicating the rights of workers is well illustrated by the nuts

and bolts operation of the administrative structure established under the DLSE for the processing and adjudication of wage claims.

The procedure is governed by California Labor Code §§ 98-98.5. Under the procedure, any employee who believes that wages are due in any amount may file a claim with the DLSE. There are nineteen (19) district offices throughout the state set up to accept such claims. Once the claim is assigned to a deputy, he or she takes an active role in seeking to resolve the dispute. If the dispute is not resolved informally, the matter is assigned to a hearing which is held within approximately 120 days from the date the claim was filed. The hearing is informal and is conducted by a hearing officer employed by the DLSE. A decision, including any award, is issued within 15 days of the conclusion of the hearing. The parties have a right to appeal to the state courts for a trial de novo; the appeal must be filed within 15 days of the service of the decision. If the award is against the employer, and an appeal is taken, the DLSE will assist the employee in enforcing the award. If an employer appeals an adverse decision, and the employee is unable to afford counsel, the DLSE will represent the employee without charge in the trial de novo. The DLSE will also assist with the enforcement of any subsequent judgment.

As is readily apparent, the entire process is a proactive one in which no claim, no matter how small, is allowed to be derailed or fall by the wayside. At every step, it is the DLSE that takes the initiative for moving the process along. The DLSE is there to insure that rights are not lost through inaction, inattention, or interference, and that wages justly due are paid. The entire administrative

staff, consisting of deputies, senior officers, and attorneys, contributes to assuring that regardless of complexity, the system will function effectively in vindicating the compensation rights of California workers. The system insures that the exercise of those rights will not be chilled. As a practical matter, the bulk of the claims are resolved at various stages throughout the process and very few proceed all the way to judgment.

In its recent decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), this Court recognized the importance of the rights conferred by the DLSE administrative procedure and held that, in denying union members access to that procedure on the sole ground that they were covered by a collective bargaining agreement containing an arbitration clause, the DLSE had violated the union members' rights under the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. California law also recognizes the importance of the DLSE administrative procedure and guarantees access to it by providing that an employee cannot enter into a binding arbitration agreement that waives the employee's right to resort to an administrative or judicial forum for the enforcement of a claim for wages. California Labor Code § 229.

In the last several years, DLSE has witnessed the ever expanding use of pre-dispute arbitration agreements by employers as a means of defeating the jurisdiction of the DLSE to process and adjudicate wage claims. Enforcement of these agreements is repeatedly sought in the courts on the basis that the FAA covers these agreements and preempts Labor Code § 229. If this Court holds that the FAA applies to the states, the proliferation of arbitration agreements will accelerate and the right of access to the DLSE administrative procedure will have become a dead letter. The decision to substitute an arbitral forum

for the robust and proactive DLSE administrative process will have been made not by a legislative body but unilaterally by an employer pursuing its own self-interest. If the FAA applies to the states, inevitably these decisions will be made by employers and not the state legislature in every area where the employer-employee relationship is subject to some form of administrative regulation, including such areas as workers' compensation and unemployment compensation. The 1925 Congress that enacted the FAA cannot be understood to have intended such a dramatic divestiture of state authority over workers' protections and its unconditional turnover to the unfettered discretion of private entities. Absent evidence of a clear mandate from the Congress to do so, which is lacking, this Court should not interpret the FAA to effectuate such a drastic shift in the balance of power between public and private authority in the area of enforcement of workers' protections and rights.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF AMICI CURIAE

Amici are law professors whose teaching and scholarship involve the fields of alternative dispute resolution, employment and employment discrimination law, labor law, and civil procedure.[1] Having studied the history and fundamental principles that underlie mandatory arbitration doctrine, and the application of the Federal Arbitration Act to employment cases in particular, amici are concerned about the lack of clear principles surrounding lower-court interpretations of the exclusion clause in § 1 of the Act, which excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, and any other class of worker engaged in foreign or interstate commerce." 9 U.S.C. § 1. The narrow interpretation of the § 1 exclusion, holding that it applies only to "transportation workers," muddles the relevant history of congressional invocations of the commerce clause. It subordinates congressional intent to a dubious principle of statutory construction, one never endorsed by this Court, that in effect the FAA must be interpreted to expand the use of mandatory arbitration as much as possible. Amici believe that an intellectually honest interpretation of the § 1 exclusion, one that is faithful to congressional intent and that gives due regard to historical context, compels the conclusion that the FAA was never intended to apply to employment contracts of any kind.[2]

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

[2] Amici's position reflects the consensus of scholarship studying the FAA. *See, e.g.*, Richard A. Epstein, *Fidelity Without Translation*, 1 Green Bag 2d 21, 27-29 (1997); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An*

SUMMARY OF ARGUMENT

Congress did not intend the FAA to cover employment contracts at all, and wrote § 1 to exclude all employment contracts that could be reached under the fullest extent of the commerce power, as understood in 1925. The legislative history confirms this. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) requires that that congressional intent – rather than some mechanical application of the 1925 language – be respected in contemporary interpretation. Therefore, the § 1 exclusion should be interpreted to reach all employment contracts regulable

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Essay in Historical Clarification, 17 Berkeley J. Emp. & Lab. L. 282, 284-88 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L. J. 1, 19 (1996); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 U.C.L.A. L. Rev. 949 (2000); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 76-80; Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. Disp. Resol. 259; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 19-20 (1997). *See also* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 993 (1999) (FAA not intended to apply to arbitrations between persons engaged in common trade/members of trade association and "outsiders").

Professor Samuel Estreicher, counsel for petitioner in this case, is the most prominent academic advocate for the application of the FAA to employment disputes. Yet even he candidly acknowledges that a "difficulty with the 'transportation industry only' reading is the absence of evidence that such a limitation reflects a discernible purpose of Congress." Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U.L. Rev. 1344, 1368 (1997).

as interstate commerce, even though that category is much broader today than it was in 1925.[3]

The narrow, "transportation workers" interpretation in vogue in the lower courts, is not only strained and inconsistently applied, but also conflicts with federalism principles, which disfavor the displacement of traditional areas of state law, such as employment, absent clear congressional intent to preempt. Finally, the question whether to extend mandatory arbitration under the FAA to employment claims raises numerous, conflicting policy considerations, which Congress in 1925 decided to avoid by exempting employment contracts from the FAA. These policy concerns, which have only become more complex since 1925, are best addressed by legislatures, not the courts, in the first instance.

ARGUMENT

I. A BROAD INTERPRETATION OF THE § 1 EXCLUSION, EXEMPTING ALL EMPLOYMENT CONTRACTS FROM FAA COVERAGE, IS THE ONE MOST CONSISTENT WITH THE STATUTORY LANGUAGE, THE INTENT OF CONGRESS AND MODERN COMMERCE CLAUSE DOCTRINE

Section 1 of the FAA provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). The task of interpreting the italicized language, "le[ft] for another day" in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), may be complicated by the expansion of the commerce power

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[3] The FAA's exclusion of all contracts of employment has no impact on the enforcement of arbitration provisions in collective bargaining agreements, because those are enforced under § 301 of the Labor Management Relations Act, rather than the FAA. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

since 1937; but it is not complicated that much. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), this Court outlined a straightforward and intellectually honest approach to construing the commerce-related language in the FAA: the touchstone is congressional intent. Just as Congress in 1925 intended the FAA to apply to all transactions that could be reached under the commerce clause, *id.*, so too Congress intended to *exclude* all *employment contracts* that could be reached under the commerce clause.

A. *Allied-Bruce* Mandates that the Original Congressional Intent to Exclude *All* Employment Contracts from the FAA Be Respected by Interpreting the § 1 Exclusion Broadly to Include all Employment Contracts Reachable Under the Commerce Power Today

In *Allied-Bruce*, this Court examined the scope of § 2 of the FAA, providing for enforcement of arbitration agreements in "a contract evidencing a transaction involving commerce[.]" 9 U.S.C. § 2. While recognizing that "[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out," 513 U.S. at 275, the opinion noted that "it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively[.]" *Id.*

Allied-Bruce did not simplistically hang modern jurisprudential definitions of the "commerce" language onto the 1925 wording; nor did it rigidly limit the commerce language to its 1925 contours. Implicitly eschewing both those approaches, the Court carefully analyzed the intent of the 1925 Congress in enacting the FAA, finding that intent to be "expansive," 513 U.S. at 274, and concluding that the phrase "involving commerce" signified a congressional intent "to exercise [its] commerce power to the

full." *Id.* at 277. This fully expansive congressional intent dictated the conclusion that § 2 of the FAA applies to arbitration agreements in any "transaction" that can be reached by the commerce clause as now understood.

Allied-Bruce thus tells us how to resolve this case: first, determine the congressional intent behind the "contracts of employment" exclusion in § 1, and then translate that *intent* – rather than the words in the abstract – into modern commerce-clause doctrine. As shown below, the § 1 exclusion was intended in 1925 to apply to all employment contracts that could be regulated by Congress under the commerce clause; accordingly, the correct interpretation is to apply the exclusion to all employment contracts that can be regulated by the commerce clause today.

Petitioner appears to advocate the two approaches implicitly *rejected* in *Allied-Bruce*. Petitioner first suggests that the FAA's commerce-invoking phrases be given their modern meaning, with "engaged in commerce" construed more narrowly than "involving commerce." Pet. Br. at 14-16. Yet petitioner also argues that the phrase "engaged in commerce" must be given the extremely narrow scope petitioner says Congress intended in 1925, without regard to post-1937 expansion of the commerce power. Pet. Br. at 19-24.

Petitioner's two suggested approaches conflict not only with *Allied-Bruce*, but also with one another. This Court has defined "engaged in commerce," post 1937, to encompass "persons or activities within the flow of interstate commerce – the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); *see Allied-Bruce*, 513 U.S. at 273.[4] Under this construction,

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[4] "Engaged in commerce" is not legally distinct from "in commerce." Interpreting other statutes, such as the Clayton Act, 15 U.S.C. § 12, this Court has disregarded the word "engaged" and focused on the term of art "in commerce." *See, e.g., Gulf Oil*

workers "engaged in foreign and interstate commerce" would include not only transportation workers, but also the far more numerous categories of workers producing goods and services for interstate consumption, and those employed in retail of such goods. The modern definition of "engaged in commerce" is thus far more extensive than the "transportation workers" interpretation which petitioner, in the end, advocates. Yet petitioner never explains why the modern meaning of "engaged in commerce" should be disregarded. In any event, neither of petitioner's suggested approaches are consistent with *Allied-Bruce*, because both would allow a substantial range of employment contracts to be covered by the FAA when it was the intent of Congress in enacting the FAA to exclude all employment contracts.[5]

B. Congress Intended to Exclude from FAA Coverage All Contracts of Employment that Could Forseeably Come Within the Federal Commerce Power

The § 1 exclusion was intended to – and did – exempt from the FAA all employment contracts that could be reached by federal law under the commerce clause. Were Congress drafting a broadly-inclusive "employment contracts" exclusion today, the language might look quite

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Corp v. Copp Paving Co., 419 U.S. 186, 195 (1974). Petitioner does not contend that "in commerce" differs from "engaged in commerce."

[5] The "transportation workers" interpretation likewise adds needless complexity to the statute by creating a third test, lying somewhere beyond "affecting commerce" and "in commerce," "thereby unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275 (rejecting interpretation of "involving commerce" in § 2 that "would create a new, unfamiliar test lying somewhere in a no-man's land between 'in commerce' and 'affecting commerce' ").

different from what was employed in the 1925 statute. But in 1925, congressional commerce authority over the employment relationship was *exceedingly narrow*: Congress could regulate only those employees "engaged in foreign or interstate commerce." Thus, in 1925 terms, the FAA's employment contracts exclusion was as broad as could be.

1. The Plain Language of § 1 Shows Congress' Intent to Exclude All Contracts of Employment from the FAA

The plain meaning of the § 1 exclusion is the first place to look for Congress' intent. Petitioner concurs that this case is one of "plain meaning of the statutory text." Pet. Br. at 24, heading C; *see id.* at 24 ("when the statutory text is clear, as in the FAA, resort to legislative history is unnecessary"). The question is how to interpret the phrase "engaged in foreign or interstate commerce." While commerce-invoking language has become "words of art" since 1937, there is no indication that such was the case in 1925. "Engaged" means "occupied; employed[.]" Webster's Third New Int'l Dict. 751 (1963); *accord* 1 The New Century Dictionary of the English Language 500 (1927) ("busy or occupied; involved"). Section 1 defines "commerce" as "commerce among the several States or with foreign nations . . . " 9 U.S.C. § 1. Therefore, § 1 excludes from the FAA all contracts of employment of persons employed or occupied in commerce among the several states.

Petitioner asks whether that language, *if written today*, would cover all employment contracts. But that is the wrong question. The proper question is whether *in 1925*, when the statute was enacted, the § 1 exclusion covered all employment contracts. It did.

2. The § 1 Exclusion Encompassed the Entire Range of Employment Contracts Congress Could Have Regulated in 1925

From the turn of the 20th century until 1937, the Supreme Court repeatedly limited federal authority to legislate the terms and conditions of employment. Most employment contracts were held to fall outside Congress' commerce power, which did not reach "manufacturing," "production" and other "local" activities. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 303-04 (1936) (striking down federal wage and hour regulations of coal miners). In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), for example, the Court struck down Congress' attempt to regulate working hours of children, holding that regulation of terms and conditions of employment in "local trades and manufacture" was reserved to the "police power" of the states and excluded from the federal commerce power. *Id.* at 274.

Congressional power to regulate the employment relationship was narrower than its scope of authority over business transactions. Business transactions to buy and sell that were "incident to" the "current" of commerce could be regulated. *See Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (upholding regulation of stockyard transactions which "cannot be separated from the [interstate] movement to which they contribute and necessarily take on its character"). But in marked contrast to such business transactions, which might be said to "involve"or "relate to" interstate commerce, *see* FAA § 2 ("transaction *involving* commerce"); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) ("control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts *relating to* interstate commerce"), the Supreme Court's commerce cases on *employment* allowed Congress to regulate only those workers "engaged in" interstate commerce.

Congress' attempts to enact workers' compensation legislation is instructive. In 1906, Congress enacted the

first version of the statute, eventually known as the Federal Employers' Liability Act (FELA), governing liability "in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee[.]" 34 Stat. 232. In the first *Employers' Liability Cases*, 207 U.S. 463 (1907), the Court struck down the statute as exceeding Congress' commerce clause power. Although Congress was deemed to have the authority "to regulate the relation of master and servant, to the extent that [such] regulations . . . are solely confined to interstate commerce," 207 U.S. at 495, the Court concluded that Congress had unconstitutionally overreached this limit by writing a statute that could be read to apply to *intra*state activities of the employees of *inter*state carriers. *Id.* at 498-99. Significantly, the Court refused the suggestion that it apply a saving construction to the statute that would have limited its application to "any employee *when engaged in* interstate commerce," language the Court indicated it would have upheld. *Id.* at 501 (emphasis added).

In April 1908, Congress enacted a revised FELA statute, adopting the limiting language suggested by the Court in the *Employers' Liability Cases*: "Every common carrier by railroad *while engaging in commerce between any of the several States* . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce*[.]" 45 U.S.C. § 51, 35 Stat. 65 (1908). This statute was upheld in the *Second Employers' Liability Cases*, 223 U.S. 1, 51-52 (1912).

Petitioner argues, anachronistically, that the FELA cases establish that even in 1925, the phrase "engaged in commerce" was understood to mean something less than the full reach of Congress' commerce power *over employment*. Pet. Br. at 18. But petitioner misreads the cases. Shortly after the first *Employers' Liability Cases*, the Court relaxed its position on commerce power from the view that regulation was permissible only *while* an employee was *actually engaging in commerce* to the slightly less restrictive view that Congress could regulate certain aspects of employment of workers whose "intrastate"

and "interstate" duties were inextricably "interwoven." *Baltimore & Ohio R. Co. v. ICC*, 221 U.S. 612, 618 (1911) (upholding regulation of working hours, on safety grounds, of railroad operators with interstate and intrastate functions); *Ill. Central R. Co. v. Behrens*, 233 U.S. 473, 477 (1914) (dictum) (commerce authority to regulate railroad switching crew not limited to their work "while engaging in commerce" given "practical difficulty in separating or dividing" their interstate and intrastate work). Such workers with "interwoven" functions were deemed sufficiently engaged in commerce to be subject to commerce clause regulation – at least where a safety statute was concerned. The message of the FELA cases was that "*while* engaging in commerce" meant less than the full reach of commerce power over employment, whereas "engaged in commerce" meant the full reach.

Petitioner blurs this distinction by quoting incompletely from *Shanks v. Delaware, L. & W. R. Co.*, 239 U.S. 556 (1916). There the court construed the FELA "while engaging in" language to mean that FELA applied if the employee, "*at the time of the injury*, [was] engaged in interstate transportation[.]" *Id. at* 558 (emphasis added). Petitioner, omitting the italicized phrase, creates the misperception that the *Shanks* court construed "while engaging in" to be synonymous with "engaged in." Pet. Br. at 18.

Only a narrow slice of the employment relationship could be regulated under the "full reach" of the commerce clause in the pre-New Deal era. The FELA cases signaled that Congress could constitutionally regulate only *interstate activities* of an employee – or the "interwoven" activities of employees with inter- and intra-state functions. Similarly, regulation of working hours was upheld against a commerce challenge on the grounds that it promoted safety of interstate travel. *See Baltimore & Ohio*, 221 U.S. at 618-19. But other aspects of the employment relation, even of workers "engaged in commerce," were still deemed "local" and therefore outside the commerce power. Thus, in *Adair v. United States*, 208 U.S. 161,

178-79 (1908), the Court struck down a federal law prohibiting anti-union "yellow dog" agreements in employment contracts of railroad workers, concluding that there was no "possible legal or logical connection . . . between an employee's membership in a labor organization and the carrying on of interstate commerce[.]" *Id.* at 178; *see Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 374 (1935) (commerce power did not extend to retirement benefits for railroad workers). While wartime wage regulation of railroad workers was upheld in *Wilson v. New*, 243 U.S. 332 (1917), the Court later contended that this was merely a "temporary measure" that was "passed to meet a sudden and great emergency." *Adkins v. Children's Hospital*, 261 U.S. 525, 551 (1923). Even the constitutionality of an arbitration statute for railroad employees was an open question. *See Adair*, 208 U.S. at 180.

Given the uncertainty surrounding the extent of power over employment relations, the employment contracts exclusion in § 1 of the FAA was at least as broad, and arguably broader, than the prevailing scope of federal regulation of employment contracts. The FAA language applied to *all* railroad employees, and any other class of worker "engaged in" – not "while engaging in" – interstate commerce. This language indicated an intent to make the exclusion as broad and comprehensive as possible. The unqualified reference to "railroad employees" was broad enough to include purely intrastate employees and would thus accommodate foreseeable expansion of congressional authority to regulate such employees. Indeed, that language seems to have anticipated *Texas & New Orleans R. Co. v. Bhd. of Ry. and Steamship Clerks*, 281 U.S. 548, 570 (1930), in which the Court quietly abandoned the "interstate functions" limitation by recognizing congressional power to regulate union activity for all railroad employees, including intrastate clerks. The phrase "any other class of workers" was, in the legal climate of 1925, a catchall provision designed to be elastic and expansive, rather than restrictive.

Petitioner, and most lower courts, have assumed that Congress meant the § 1 exclusion to set an outer limit at transportation workers, irrespective of any subsequent expansion of the scope of the commerce clause. Yet, it borders on historical absurdity to suggest that Congress would have written the FAA in the way it did if it had any intention of *including any* employment contracts. Congress' power to regulate the employment contracts of workers other than those directly engaged in interstate commerce was so much in doubt, and an attempt to do so would have been so radical a departure from prevailing legislative practice, that one would expect to see statutory language at least attempting to grapple with the restrictive commerce clause doctrine by carefully defining what employment contracts would be covered by the FAA. Congress was well aware that the Supreme Court both placed strict constitutional limits on the regulation of the employment relationship *and* refused to construe statutes flexibly in order to save them from unconstitutionality. Accordingly, Congress would not have relied upon the vaguely implied residuum of a broadly-worded *exclusionary* clause as a way of defining a class of employment contracts to be *included* in the statute. As seen in the *Employers' Liability Cases*, the Court required precise, affirmative definitions of legislative categories of employers and employees, making explicit their connections to commerce. And Congress adhered to that requirement in drafting statutes of that era. *See, e.g.*, Railway Labor Act, 45 U.S.C. § 151, 44 Stat. 577 (1926) (containing lengthy definitions of both "employer" and "employee" showing connection to commerce); Act of March 4, 1907, 34 Stat. 1415-16 (defining "employees" as "persons actually engaged in or connected with the movement of any train").

In sum, Congress had reason to believe in 1925 that it could not, under the commerce clause, have extended the FAA to any employment contracts if it had wanted to. In any case, Congress didn't want to – and readily made

that plain by extending the § 1 exclusion to the full reach of its commerce power *over employment contracts*.

C. The Legislative History Further Demonstrates that the FAA Was Not Intended to Cover *Any* Employment Contracts

"[T]here is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities." *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting). The FAA's legislative history is filled with statements that the purpose of the act is to settle disputes between "businessmen." *See, e.g.*, Joint Hearings on S. 1005 and H.R. 646, Subcomms. of Comms. on Judiciary, 68th Cong., 1st Sess., 18 (1924) (statement of Julius H. Cohen) (act drafted "for businessmen"); Schwartz, *supra* note 2, at 77-78. The FAA's drafters were in tune with the Supreme Court's severe restrictions on employment regulation: the bill, according to W.H.H. Piatt (chairman of the ABA committee which drafted it) was "not intended [to] be an act referring to labor disputes at all," but rather "is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong, 4th Sess. 7, 9 (1923) (hereinafter "*Senate Hearings*") (emphasis added).

Nevertheless, when the original version of the arbitration bill was introduced into the Senate and House in late December 1922, H.R. 13522, 67th Cong., 4th Sess. (1922), it came to the attention of Andrew Furuseth, President of the International Seamen's Union (ISU), who promptly prepared an analysis opposing the bill and presented it to the ISU on January 13, 1923. *See* Finkin, *supra* note 2, at 284-88. While Furuseth worried that boilerplate arbitration clauses in individual seamen's

employment contracts would be specifically enforced, he also criticized the arbitration bill on the broader ground that it would force all sorts of employees, through individual adhesion contracts, to forfeit the protection of the courts. *Id.* at 301 (reprinting Furuseth's report on the arbitration bill); *see also Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 467 & n.2 (1957) (Frankfurter, J., dissenting) (noting Furuseth's opposition to what he perceived would be "the effect of the [FAA] on individual contracts" as well as collective agreements). Consequently, the ISU joined the American Federation of Labor in resolving to "prevent[ ] the enactment of any measure designed to fasten any species of compulsory arbitration *upon any group of workers in America*." Finkin, *supra* note 2, at 289 (quoting ISU proceedings).

Furuseth's concern about the act's application to adhesive employment contracts was echoed at the Senate subcommittee hearings on January 31, 1923:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. Take an insurance policy. . . . It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well there is nothing for the man to do except to sign it and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate Hearings at 9 (1923) (remarks of Sen. Walsh).

The language that ultimately became the § 1 exclusion was a belt-and-suspenders operation to provide reassurance – redundant, in the proponents' views – that employment contracts would not be covered by the Act. At the January 31 Senate subcommittee hearing, Piatt responded to Furuseth's objection by stating that

> It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned,

> *if your honorable committee should feel that there is any danger of that*, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce."

Id. (emphasis added). That day, Secretary of Commerce Herbert Hoover likewise proposed the wording that was ultimately adopted as the § 1 exclusion; Hoover suggested it be added "[i]f the objection appears to the inclusion of workers' contracts in the law's scheme[.]" Hoover Letter of January 31, 1923, reprinted in *Senate Hearings*, at 14; *see* Finkin, *supra* note 2, at 285 (describing response of arbitration bill's supporters to employment contracts issue). "In sum, almost immediately after the bill was offered, the status of 'workers contracts' under it became an issue that was with equal alacrity rendered moot for the elemental reason that the bill's proponents had drafted and were pressing a commercial arbitration law wholly unconcerned with employment." Matthew W. Finkin, *Employment Contracts Under the FAA – Reconsidered*, 48 Lab. L. J. 329, 330 (1997).

D. The Canons of Construction Fail to Support the "Transportation Workers" Interpretation

Petitioner and the "transportation workers" decisions rely heavily on certain canons of statutory construction. No one explains why such interpretive aids are needed in what petitioner agrees is a plain language case. Even so, none of the "canon" arguments even supports the narrow interpretation.

1. "Ejusdem generis"

"Ejusdem generis," "[o]rdinarily . . . limits general terms which follow specific ones to matters similar to those specified[.]" *Gooch v. United States*, 297 U.S. 124, 128 (1936). Petitioner argues that "workers engaged in interstate or foreign commerce" is a general term that must take its meaning from the purported "list" of types of

employee who are "actually engaged in the movement of interstate or foreign commerce." Pet. Br. at 21. Since it was first advanced in *Tenney Engineering v. United Electrical, Radio and Machine Workers*, 207 F.2d 450, 452 (3d Cir. 1953), this ill-conceived argument has been uncritically accepted by most of the lower courts adopting the transportation workers interpretation. *See, e.g., Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1470 (D.C. Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

Canons do not compel a particular statutory interpretation, but "simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it." Henry Hart and Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1191 (Eskridge & Frickey ed. 1994) (emphasis in original). The "ejusdem generis" canon "may not be used to defeat the obvious purpose of legislation." *Gooch*, 297 U.S. at 128. In *Gooch* itself, this Court rejected a "ejusdem generis" argument, after finding the answer in the language of the statute as clarified by its legislative history. *See id.* Here, likewise, ejusdem generis does not supply a persuasive reason to depart from the meaning of "engaged in commerce" that would have been plain to Congress in 1925.

Moreover, ejusdem generis can support either the broad or narrow interpretation. The argument that "workers engaged in . . . commerce" means "transportation workers" depends on an arbitrarily narrow characterization of the other items in the list. To be sure, seamen and railroad workers can be categorized as "transportation workers." But they can also be categorized as "employees subject to congressional authority." Thus, ejusdem generis also supports the interpretation offered here that "workers engaged in . . . commerce" was meant to apply to all employees subject to the commerce power.

2. The "Anti-Superfluity" Rule

It has similarly been argued that a broad interpretation of "any other class of workers" would render "superfluous" the preceding enumeration of "seamen" and "railroad employees." *Cole*, 105 F.3d at 1470; *accord Rojas v. TK Communications*, 87 F.3d 745, 748 (5th Cir. 1996); Pet. Br. at 22-23. But defining the "other class of workers" to mean "transportation workers" does not eliminate the supposed "superfluity": on the contrary, that definition too creates overlap with "seamen" and "railroad employees," which, according to petitioner's ejusdem generis argument, are specific examples of transportation workers. Indeed, the "ejusdem generis" and "anti-surplusage" canons contradict each other here. Arguably, this overlap is mitigated by the phrase "any other." But this same point could be made in defense of the broad interpretation – workers engaged in commerce as the equivalent of "employees subject to federal commerce regulation" – which creates no more overlap with "seamen" and "railroad employees" than does the "transportation workers" interpretation. Thus, the "rule against superfluity" equally supports both interpretations.

Furthermore, Congress has a long history of using overlapping phrases in its jurisdictional commerce clause language. The Labor-Management Reporting and Disclosure Act of 1959, for example, defines "industry affecting commerce," to which the act applies, as "any activity, business, or industry [1] in commerce or [2] in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and [3] includes any activity or industry 'affecting commerce' within the meaning of the Labor Management Relations Act, 1947[.]" 29 U.S.C. § 402(c) (bracketed numbers added). A labor dispute in an industry "in commerce" would "hinder or obstruct commerce or the free flow of commerce": therefore, industries "in commerce" are plainly included in the second, broader category. The third category – invoking

the LMRA's definition of "affecting commerce" – is virtually identical with, and therefore perfectly overlaps, the preceding two categories: The LMRA defines "industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." 29 U.S.C. § 142(1). *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(h) (defining "industry affecting commerce" in nearly identical terms). Obviously, where, as here, the commerce clause language is intended to list overlapping categories, the "anti-superfluity" rule makes no sense. That "rule" would also dictate that the term "industry" be construed to exclude "business" or "activity," lest those other terms be rendered "superfluous"; that, in turn, would mean that an "industry affecting commerce" would exclude businesses and activities – in direct contradiction of the definition of "industry affecting commerce."

Rather than undertaking the impossible mission of eliminating all overlap in statutory "lists," the more sensible approach to the § 1 exclusion is to recognize that seamen and railroad employees were listed as established examples of employees subject to federal regulation, and the phrase "any other class of workers" was intended to reach the remainder of employees arguably subject to federal regulation. As an historical matter, it is also likely that seamen's contracts were listed separately to reassure Furuseth's union, "railroad employees" were added for good measure at the suggestion of Secretary of Commerce Hoover, whose department regulated railroad employees (and no others); and the phrase "any other class of workers" was added to make the exemption as emphatic and comprehensive as possible.

3. The "Alternative Language" Argument

Some courts support the narrow interpretation by arguing that "[a] broad exclusion of all employment contracts could simply have said 'nothing herein shall pertain to employment contracts.' " *Cole*, 105 F.3d at 1470-71. But it is anachronistic to place great significance on the failure of Congress in 1925 to use a broad reference to "all contracts of employment" that would sound better and plainer to the modern ear. Congressional drafting habits had been shaped by Supreme Court cases signaling that the Court would not rewrite overly broad commerce clause language to save it from unconstitutionality. *See Employers' Liability Cases*, 207 U.S. 463, 501 (1907). Congress would thus be more likely to enumerate the categories of contracts within its regulatory power, rather than use an overly broad reference to all "contracts of employment."

More importantly, Congress' failure to use the proffered broad reference to all "contracts of employment" does not prove the contrary conclusion – that Congress therefore wished to limit the exclusion to transportation workers. Had *that* been the intent, Congress could have said: "any other workers *actually engaged in interstate transportation*" or "*employed by common carriers*" or "*persons actually engaged in or connected with the movement of passengers or property in foreign or interstate commerce.*" By 1925, Congress had long been aware of how to draft language to specify categories of transportation workers. The "Hours of Service" Act (Act of March 4, 1907), 34 Stat. 1415-16, defined "common carrier" as being "engaged in the transportation of passengers or property by railroad" and provided that "the term 'employees' as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train[.]" The Interstate Commerce Act of 1887, 24 Stat. 379 applied by its terms "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad; or partly by railroad and partly by

water . . . " The first FELA statute applied to "every common carrier," 34 Stat. 232, and the second to "every common carrier by railroad." 35 Stat. 65. The fact that such familiar language specifying transportation workers was *not* used in FAA § 1 weighs against the "transportation workers" interpretation.

E. The "Transportation Workers" Interpretation is Implausible on its Face

The "transportation workers" interpretation asks us to accept that Congress wrote a statute excluding all employment contracts from FAA coverage in 1925, and yet somehow "intended" that in some foreseeable future circumstances some employment contracts, but not others, would come under the FAA. It does not suffice to say, as a number of courts have, that *in 1925*, the statutory phrase "workers engaged in foreign or interstate commerce" applied only to employees "involved in, or closely related to, the actual movement of goods in interstate commerce". *Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971). That point does not contradict – and indeed supports – the view that "workers engaged in foreign or interstate commerce" defined the full scope of congressional power over employment contracts. The "transportation worker" courts must at a minimum show a congressional intent to regulate a class of employment contracts decidedly smaller than what Congress in 1925 believed it could have regulated.[6]

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[6] Even Professor Estreicher, who advocates mandatory arbitration of employment claims, acknowledges that:

> [A] difficulty with the "transportation industry only" reading is the absence of evidence that such a limitation reflects a discernible purpose of Congress. While it is hard to assume Congress would have any purpose to exclude arbitration agreements signed by highly-placed executives, it is no less difficult to attribute to Congress some purpose for excluding individual employment contracts of seamen, railroad employees, and others directly engaged in interstate shipment of goods while covering individual employment contracts of all others who work for firms subject to its commerce power.

Estreicher, *supra* note 2, at 1368.

Two theories have been ventured by courts troubled by the facial implausibility of such a congressional intention. One suggests that Congress believed it unnecessary to extend the FAA to those workers who already had dispute resolution systems in place. *See Tenney*, 207 F.2d at 452-53; *Asplundh*, 71 F.3d at 598; *see also Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997). Another suggests that seamen and railroad employees were "heavily regulated" by the federal government, while similar "comprehensive" motor carrier regulation seemed imminent. *See Pryner*, 109 F.3d at 358.

Petitioner rejects these theories as "conjecture," "speculat[ion]" and "surmise[ ]." Pet. Br. at 27. Amici agree. Further, the theories are plain wrong. First, they are contradicted by the legislative record. As shown above, the exclusion was added to allay fears from organized labor that the FAA could be construed to apply to any employment contracts, including individual ones. Secretary Hoover proposed that the exclusionary language be added *"[i]f* the objection appears to the inclusion of workers' contracts in the law's scheme[.]" *Senate Hearings* at 14 (emphasis added). There is no indication in the legislative record that "workers contracts" should be excluded because workers already had arbitration. Nor is there any need to speculate about congressional intent when the actual reasons for the exclusion appear in the record.

Second, the statutory language does not fit this theory. In 1925, "other" transportation workers, such as motor carriers, were not covered by any ADR system.

Motor carriers would have been an obvious, major component of "any other class of workers engaged in foreign or interstate commerce" since they were a numerous and high profile sector of employment, whose regulatory status – whether subject to state or federal control – was an active legal and political controversy being played out in the courts and Secretary Hoover's commerce department.[7]

Recognizing this difficulty, Chief Judge Posner shifted the argument and"surmised" (Pet. Br. at 27) that "any other class of workers" meant workers subject to current or foreseeable federal *regulation*. *Pryner*, 109 F.3d at 358. But that simply restates the interpretation offered by amici here: the phrase was meant to encompass all employment contracts subject to *regulation* under the commerce power. It fails to explain any special congressional concern for "transportation workers" to the exclusion of all others who might someday come within the commerce power.

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[7] The number of registered commercial trucks doubled between 1920 and 1924 from over 1 million to more than 2 million. Donald V. Harper, Economic Regulation of the Motor Trucking Industry by the States 4 (1959). At the beginning of 1925, bus companies operated approximately 53,000 buses and employed 125,000 to 150,000 people. John J. George, Motor Carrier Regulation in the United States 2 (1929). A major political conflict was developing in the early 1920s between trucking and rail interests, with the railroads advocating bringing interstate trucking under the control of the Interstate Commerce Commission. *Id.* at 240-44. The law was unsettled about the extent of federal authority over the trucking industry, which resisted federal regulation by arguing that its operations were "primarily local, short-haul" in nature. *Id.* at 220-26, 243-44; *see Buck v. Kuykendall*, 267 U.S. 308 (1923) (holding that dormant commerce clause denied states the power to deny operating certificates to interstate motor carriers).

F. The Apparent Consistency of Lower Courts in Adopting the "Transportation Workers" Interpretation is Illusory

While the Ninth Circuit is the only one to have rejected, currently, the "transportation workers" interpretation for all employment contracts, petitioner oversimplifies greatly by saying that the other circuits "have with almost perfect consistency construed the § 1 exclusion narrowly." Pet. Br. at 31. The circuits adopting the "transportation workers" interpretation of the § 1 exclusion have hardly demonstrated exemplary reasoning or consistency on the issue.

The "transportation workers" decisions have virtually all purported to follow *Tenney*, 207 F.2d 450, and even those that do not cite *Tenney* share its heavy reliance on the "ejusdem generis" argument and its failure to reckon with the legislative history and the historical context of the phrase "engaged in commerce." *Tenney* was one of several cases from the 1950s in which courts "[f]earful that the anti-arbitration premises of state common law would undermine labor arbitration, . . . strove mightily to preserve some role for the FAA in enforcing arbitration promises in collective agreements." Estreicher, *supra* note 2, at 1367. However, this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), which found the authority for enforcement of labor arbitration in LMRA § 301, rather than the FAA, "essentially removed the need for such creative readings." Estreicher, *supra* note 2, at 1367.

The courts of appeals have also taken self-contradictory positions with respect to the § 1 exclusion. Five courts of appeals have failed to adhere to the "transportation workers" interpretation in cases involving collective bargaining agreements (CBAs), holding instead that workers covered by CBAs are "engaged in interstate commerce" regardless of their line of work. *See Posadas de Puerto Rico v. Asociacion de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064,

1067 (4th Cir. 1993); *Miller v. Public Storage*, 121 F.3d 215, 218 (5th Cir. 1997) (trying to reconcile circuit authority holding § 1 exclusion applies to all CBAs with cases applying "transportation workers" limitation to individual contracts); *Kemner v. Dist. Council of Painting Trades*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985); *United Food and Commercial Workers Local Union No. 7R v. Safeway Stores*, 889 F.2d 940, 943-44 (10th Cir. 1989). Because there is no basis in the FAA to distinguish between workers who are covered by CBAs and those who are not, these holdings are de facto endorsements of a broad interpretation of the § 1 exclusion, and conflict with the "transportation workers" interpretation. Only three circuits have applied the "transportation workers" interpretation to CBA cases, and each has conflicting intra-circuit precedent on this point. *Compare Maryland Casualty Co. v. Realty Advisory Bd.*, 107 F.3d 979, 982 (2d Cir. 1997); *Virgin Islands v. United Indus. Workers*, 169 F.3d 172, 177 (3d Cir. 1999) (applying narrow interpretation of § 1 exclusion in CBA cases), *with Harry Hoffman Printing v. Graphic Communications Int'l Union*, 912 F.2d 608, 612 (2d Cir. 1990) (FAA "does not even apply to disputes involving CBAs"); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1127 n.18 (3d Cir. 1969) (FAA is "inapplicable to appeals from labor arbitration awards due to the exclusion of 'contracts of employment' "); *Service Employees Int'l Union v. Office Center Services*, 670 F.2d 404, 407 n.6 (3d Cir. 1982) (dictum) ("serious question as to whether the applicability of the [FAA] to labor arbitration agreements retains any vitality in this circuit"); *Pritzker v. Merrill Lynch Pierce Fenner & Smith*, 7 F.3d 1110, 1120 (3d Cir. 1993) (appellants "correctly note that the FAA by its own terms does not apply to employment contracts"). *See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir. 1997) (holding narrow interpretation applies to both individual contracts and CBAs but harmonizing conflicting cases by deciding that only *procedural* aspects of the FAA apply to CBAs, while *substantive* issues, including vacating and enforcing

awards, are determined by federal common law under LMRA § 301).

II. THE NARROW, "TRANSPORTATION WORKERS" INTERPRETATION CANNOT BE JUSTIFIED BY A GENERALIZED PRO-ARBITRATION POLICY

A. The "Transportation Workers" Interpretation Extends the FAA's Displacement of Traditional State Law, thereby Extending an Interpretation of the FAA that Five Justices of this Court Have Recognized as Erroneous

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that § 2 of the FAA preempts state laws restrictive of arbitration. *Southland* further requires state courts to apply the substantive right created in FAA § 2, using the procedures set forth in FAA §§ 3 and 4. *See Southland*, 465 U.S. at 24 (O'Connor, J., dissenting).[8] In determining whether the FAA applies to employment contracts, this Court will necessarily decide whether these preemptive aspects of *Southland* will be extended to the employment setting.

" '[W]here . . . the field which congress is said to have preempted includes areas that have been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (*quoting English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)). "To the extent that federal statutes are ambiguous, we do not read them to displace state law." *Allied-Bruce*, 513 U.S. at 292 (Thomas, J., dissenting); *accord Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest

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[8] Therefore, petitioner in the case at bench could have asked the state court to stay the litigation pursuant to FAA § 3.

purpose of Congress"); *id.* at 21 ("[a] state policy excluding wage claims from arbitration . . . can be recognized without impairing the basic purposes of the federal statute").

Regulation of the employment relationship is such an area traditionally occupied by state law. *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992) ("regulation of the workplace" is "a field traditionally occupied by the states"); *Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714, 719 (1963) (regulation of employment relationship is area within "traditional powers" of states); *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (labor relations within states' traditional police powers).

None of the post-*Southland* cases adopting the "transportation workers" exception, and broadly applying the FAA to most employment contracts, have so much as mentioned these preemption principles – another serious analytical flaw in those cases. Preemption principles dictate that the following question be addressed: In enacting the FAA with the exclusionary language in § 1, did Congress unambiguously intend to displace state laws regulating employment contracts? To ask the question is to answer it. The cases adopting the "transportation workers" interpretation have strained to do so, relying on ambiguous interpretive aids; even giving these cases the benefit of the doubt, they can hardly support the view that the FAA manifests a clear intent to preempt all state regulation of arbitration agreements in the employment setting. In any event, as shown above, Congress intended the FAA to exclude all employment contracts reachable by federal regulation, and therefore intended *not* to displace *any* state regulation of employment contracts.

It is also significant to the preemption question that *five current justices of this Court* have at one time or another specifically stated that *Southland* was wrongly decided. *See Southland*, 465 U.S. at 18-21 (Stevens, J., concurring in part and dissenting in part) (dissenting from proposition that § 2 of FAA preempts state statutes, as opposed to common-law rules, limiting enforceabilility of arbitration agreements for certain types of cases); 465 U.S. at 24 (O'Connor, J., joined by Rehnquist, J., dissenting) (*Southland* majority wrongly concluded that FAA § 2 created federal substantive rights that must be enforced in state courts); *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (same); *id.* at 284-85 (Scalia, J., dissenting) ("Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes"); *id.* at 285 (Thomas, J., joined by Scalia, J., dissenting) ("In my view, the Federal Arbitration Act does not apply in state courts"). While undersigned amici respectfully submit that *Southland* was wrongly decided for the reasons stated in the above-cited dissenting and concurring opinions, *Southland*'s controversial holding was expressly reaffirmed in *Allied-Bruce* (despite the request, supported by 20 state attorneys general, that it be overruled), and in any event, the correctness of *Southland* as such is not raised in the issue on which certiorari is granted here. Nevertheless, the objections to it voiced by five current justices of this Court are hardly a recommendation for *extending* the effect of *Southland* even further.

The proper interpretation of the § 1 exclusion to exempt all employment contracts from FAA coverage would allow states to regulate, under their own contract law, the extent to which employment contracts should be subject to compelled arbitration. A number of states already have laws on the books that would do so. *See, e.g., Bungard v. Rural Mutual Ins. Co.*, 193 Wis. 2d 638, 537 N.W.2d 433 (Wis. App. 1995) (Wisconsin Arbitration Act (WIS. STATS. § 788.01) excluding employment contracts from enforcement provision, conflicts with, and is therefore preempted by, FAA); Grodin, *supra* note 2, at 18 (listing statutes). All these laws would be preempted (except for transportation workers) if the narrow interpretation were applied. *See Doctors' Assocs. v. Cassarotto*,

517 U.S. 681 (1996) (Montana statute requiring special notice for arbitration agreements preempted by FAA § 2); *Allied-Bruce*, 513 U.S. at 269, 282 (FAA § 2 preempts Alabama statute making pre-dispute arbitration agreement unenforceable); *Perry v. Thomas*, 482 U.S. 482 (1987) (FAA § 2 preempts California statute making arbitration agreements unenforceable as to statutory wage and hour claims). The National Conference of Commissioners on Uniform State Laws (NCCUSL) was considering addressing issues relating to adhesive arbitration agreements in its Revised Uniform Arbitration Act, but determined that "the preemptive effect of the Federal Arbitration Act,. . . . dramatically limits meaningful choices for drafters addressing adhesion contracts[.]" NCCUSL, *Adhesion Arbitration Agreements and the RUAA*, (last modified Aug. 23, 2000) <http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm>. However, the federalism-based preemption principles stated above strongly support a broad construction of the § 1 exclusion, with the result that the traditionally state-regulated field of employment contracts would not be preempted.

B. Relying on a Generalized "Pro-Arbitration" Policy to Bootstrap the FAA to Coverage of Employment Cases Intrudes on the Role of Legislatures

Congress intended to exclude all employment contracts from FAA coverage, and therefore never intended to extend any "policy favoring arbitration" to employment contracts. It is no answer to this argument to say that "the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption," *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997), because that policy does not apply.

Yet the lower courts adopting the narrow interpretation have all indulged in that circular reasoning. In doing so, the lower courts have made a sweeping policy determination that Congress specifically sought to avoid. In

1925, Congress was presented with objections to compelled arbitration of employment disputes pursuant to boilerplate arbitration provisions unilaterally imposed by employers in individual adhesion contracts. Rather than develop and consider these concerns through extended study and debate, Congress avoided the issue by immediately exempting workers' contracts altogether.

Since 1925, these issues have not disappeared, but have become far more complex. Numerous academic commentators have echoed Justice Stevens' warning that the "additional extension of the FAA" "as broadly encompassing disputes arising out of the employment relationship" is "erroneous" and would "clearly eviscerate[ ] the important role played by an independent judiciary in eradicating employment discrimination." *Gilmer*, 500 U.S. at 44 (Stevens, J., dissenting). Mandatory arbitration pursuant to arbitration agreements required by employers as a condition of employment raises great potential for unfairness, for undermining employee-protective legislation, and for sowing doctrinal confusion.[9]

Furthermore, extending mandatory arbitration under the FAA to employment disputes may also go a long way toward undermining the economy and efficiency of arbitration, relative to litigation, that led Congress to enact the FAA in the first place. The influx of employment and

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[9] *See, e.g.*, Lisa B. Bingham. *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998); Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: the Yellow Dog Contract of the 1990s*, Denv. U. L. Rev. 1017 (1996); articles cited *supra* note 2.

Among other problems, mandatory arbitration of employment claims raises constitutional waiver issues which have never been adequately addressed in the courts. *See, e.g.*, Reuben, *supra* note 2, at 1019-43 (2000); Sternlight, *supra* note 2, at 53-82.

civil rights claims into the mandatory arbitration setting has placed great pressure on the institution of arbitration to permit increasing "due process" safeguards on arbitration, many of which – such as increased discovery – make it increasingly resemble litigation.[10] Some of this pressure has come from judicial decisions. *See, e.g., Cole*, 105 F.3d at 1479-87 (imposing due process safeguards).

Amici respectfully submit that the branch of government best suited institutionally to confront the policy questions Congress avoided in enacting the FAA – balancing the desirability of arbitration versus "the important role played by an independent judiciary" in resolving employment disputes – is Congress, not the courts. The courts should not arrogate this responsibility to themselves in the name of a statutory policy in favor of arbitration that was never intended to apply to employment contracts.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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[10] The "Due Process Protocol," trumpeted by the American Arbitration Association in its amicus brief to this court, is one example of such procedures. *See* Amicus Brief of Am. Arb. Assn. in Support of Pet. at 6-7.